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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

In the Matter of Establishment Inspection of:
HERN IRON WORKS, INC.,
Petitioner,

v.

RAYMOND J. DONOVAN,
Secretary of Labor, U.S. Department of Labor,
Respondent,

and

In the Matter of Establishment Inspection of:
LEWIS YOUNGSTROM, an individual, doing business as
YOUNGSTROM'S LOG HOMES,
Petitioner,

v.

U.S. Department of Labor,
Occupational Safety and Health Administration,
Respondent.

PETITION FOR WRITS OF CERTIORARI BEFORE AND AFTER JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Plaintiff-Respondent,

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In the Matter of Establishment Inspection of:
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Defendant-Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,
Occupational Safety and Health Administration,

Plaintiff-Respondent.

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PETITION FOR WRITS OF CERTIORARI TO REVIEW CASES BOTH BEFORE AND AFTER JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review the case of *Hern Iron Works, Inc. v. Donovan* after judgment, and the case of *Youngstrom v. United States Department of Labor* before judgment.

OPINIONS BELOW

Hern Iron Works, Inc. v. Donovan

The opinion of the United States Court of Appeals for the Ninth Circuit from which review is sought is reported at 670 F.2d 838 (9th Cir. 1982). A copy of this opinion is included in the Appendix as Exhibit B.

The order of contempt of the United States District Court for the District of Idaho, imposing a fine of $1,000 on defendant for refusing to obey a warrant for inspection issued by that court, is unreported. A copy of this Order is included in the Appendix as Exhibit C.

Youngstrom v. United States Department of Labor

The order of contempt of the United States District Court for the District of Idaho, dated April 20, 1981, and imposing a fine of $500 for defendant's refusal to comply with a warrant for inspection, is not reported. A copy of this Order appears in the Appendix as Exhibit D.

Although this Contempt Order has been appealed to the United States Court of Appeals for the Ninth Circuit, no judgment or opinion has been issued by the Court of Appeals.

JURISDICTION

Hern Iron Works, Inc. v. Donovan

This is a contempt action for petitioner-defendant's refusal to obey a warrant for inspection issued pursuant to 29 U.S.C. § 657(a) (1970). Jurisdiction of the district court is founded upon 28 U.S.C. § 1331 (1980).

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit after judgment is founded upon 28 U.S.C. 1254(1) (1976). Judgment was entered in the Court of Appeals on March 1, 1982.

No motion for rehearing was filed.

Youngstrom v. United States Department of Labor

Petitioner-defendant was held in contempt of court for refusing to obey a warrant for inspection issued pursuant to 29 U.S.C. § 657(a) (1970). Jurisdiction of the district court is founded upon 28 U.S.C. § 1331 (1980).

Jurisdiction of this Court to issue a Writ of Certiorari to review the decision of the United States District Court for the District of Idaho, pending judgment by the United States Court of Appeals for the Ninth Circuit, is founded upon 28 U.S.C. § 1254(1) (1976). Judgment was entered in the district court on April 17, 1981, and Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was filed on June 10, 1981. Since this case has been properly docketed in the court of appeals, it comes within 28 U.S.C. § 1254(1).

No judgment or opinion has been issued by the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Subsection 8(a) of the Occupational Safety and Health Act, 29 U.S.C. § 657(a), provides:

> (a) in order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized —
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, *any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein*, and to question privately any such employer, owner, operator, agent or employee. (emphasis added).

Subsection 8(f)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 657 (f)(1), provides:

> (f)(1) any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees refered to therein shall not appear in such copy or any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to

believe such violation or danger exists, *he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists.* If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination. (emphasis added).

OSHA Regulation at 29 C.F.R. § 1903.11(b) provides:

(b) If upon receipt of such notification the Area Director determines that the complaint meets the requirements set forth in paragraph (a) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. *Inspections under this section shall not be limited to matters referred to in the complaint.* (emphasis added).

STATEMENT OF THE CASES

Hern Iron Works, Inc. v. Donovan

The Ninth Circuit in this case held that "wall-to-wall" inspections which are conducted pursuant to employee complaints under subsection 8(f) of the Occupational Safety and Health Act are generally permitted. 670 F.2d at 841.

Hern Iron Works, Inc. (Hern) operates a foundry and business in Coeur d'Alene, Idaho. An Application for Reissuance[1] of an Inspection Warrant to inspect the Hern premises was filed by the Secretary before Judge Ray McNichols in the United States District Court for the District of Idaho on June 17, 1980. App., Exh. E. The Application asks that an inspection warrant issue pursuant to an inspection program authorized under subsection 8(a) of the Occupational Safety and Health Act (the Act), and to an employee complaint under subsection 8(f) of the Act. Yet, the Application does not allege any facts indicating that the defendant's establishment was selected pursuant to reasonable administrative standards or on the basis of information derived from

[1] Two former warrants were defeated on procedural grounds.

neutral sources as required under subsection 8(a). The Secretary's warrant application was accompanied by the affidavit of an OSHA compliance officer, which clearly indicates that there are more than two buildings located on the Hern premises. App., Exh. F.

The employee complaint upon which the Secretary founded his Application for Reissuance of an Inspection Warrant alleges two distinct violations, and particularly describes the building or worksite where the alleged violations are located as being the "metal pouring section of the plant" and "the foundry area" (both refer to the same section of the same building). App., Exh. G. The reference to the metal-pouring section of the plant in the Complaint, to the "worksite and business" in the Secretary's warrant application, and to the various buildings on the premises in the compliance officer's affidavit, provided the issuing judge with sufficient information to determine that there was more than one building located on the Hern premises.

Judge McNichols issued a warrant for inspection on June 16, 1980, which made no reference to the fact that it was issued pursuant to an employee complaint, but rather purported to be pursuant to subsection 8(a) of the Act relating to inspection programs. App., Exh. H. This warrant authorized a "wall-to-wall" inspection of the entire Hern premises. When served with this warrant by the compliance officer, Mr. Hern refused to permit the inspection.

Appearing pro se before Judge McNichols during the Contempt Hearing, Mr. Hern stated as his reasons for refusing the inspection, inter alia, that it was unconstitutional since it was overly broad in scope and bore no relation to the employee complaint upon which it was based. *Hern* TR. 50. Judge McNichols nevertheless held Hern in contempt of court, *Hern* TR. 61-62, and imposed a fine of $1,000, later suspended pending appeal. *Hern* TR. 64.

On appeal to the United States Court of Appeals for the Ninth Circuit, the Order of the district court was affirmed. Holding that the Hern warrant was proper in scope, the court of appeals concluded that the Judge could have reasonably inferred that a general inspection was necessary to determine the existence of the alleged violations since there was no information before

him indicating that the Hern foundry was a multi-faceted establishment, 670 F.2d at 841, and that in any case, "wall-to-wall" inspections were generally permitted in response to employee complaints. *Id.*

Youngstrom v. United States Department of Labor

The relevant facts are undisputed. Lewis Youngstrom, doing business in Blackfoot, Idaho as Youngstrom's Log Homes, manufactures machine logs for dwellings. On the basis of an employee complaint, the Secretary filed an Application for a Warrant before Judge McNichols in the United States District Court for the District of Idaho, requesting authorization to conduct a general inspection of Youngstrom's entire business premises. App., Exh. I. Youngstrom's premises consist of an office building, a storage area, and several other buildings situated on eighteen acres. Testimony of Youngstrom, *Youngstrom* TR. at 7-8. Accompanying the Application was the affidavit of an OSHA compliance officer attesting to the fact that the requested inspection was made pursuant to an employee complaint. App., Exh. J. The complaining employee injured his big toe in the chain of a bark-stripping machine. He later alleged, adding seven other detailed complaints, that the log stripping machine was missing a chain guard. App., Exh. K.

A warrant authorizing a general "wall-to-wall" inspection issued from the district court on December 1, 1980. App., Exh. L. This warrant made no reference to the employee complaint, but rather purported to issue pursuant to a general inspection program under subsection 8(a) of the Act. When the compliance officer attempted to serve the warrant, Youngstrom refused to permit an inspection. He had previously refused to permit a *warrantless* inspection because its scope was not limited to the machine where the employee had allegedly hurt his foot. In declining to permit inspection pursuant to the warrant, Youngstrom maintained his position that the desired search was overbroad. At all times Youngstrom was willing to permit inspection of the log-stripping machine, even in the absence of a warrant. Affidavit of Haning at 3, L. 8-10 (App., Exh. J).

After a hearing before the United States District Court for the District of Idaho, defendant Youngstrom was held in contempt of court and fined $500. This fine was suspended pending appeal of the Order to the United States Court of Appeals for the Ninth Circuit. The district judge interpreted subsection 8(f) of the Act as permitting routine "wall-to-wall" inspections pursuant to employee complaints, and reasoned that since the warrant in question was therefore valid, it should have been obeyed. *Youngstrom* TR. at 31, L. 10-18.

Notice of appeal to the United States Court of Appeals for the Ninth Circuit was taken on June 10, 1981. No judgment or opinion has been issued by the court of appeals.

CONSIDERATIONS COMPELLING GRANT OF THE PETITION

Several federal circuit courts of appeal disagree as to the permissible scope of complaint-based warrants under both the fourth amendment and the Occupational Safety and Health Act. While the Seventh, Eighth, and Tenth Circuits hold that probable cause guarantees of the fourth amendment, as defined by this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), require that such warrants be limited in scope whenever possible, the Fourth and Ninth Circuits authorize issuance of "wall-to-wall" warrants whenever founded upon employee complaints. Circuits deciding the issue under the Act itself are similarly split, with the Third Circuit holding in favor of limited-scope warrants and the Fourth and Ninth Circuits against. *See Chart Appearing in Appendix as Exhibit A.*

OSHA's administrative bodies have also split on the issue. Despite the Secretary's promulgation of a regulation purporting to authorize broad-scope warrants in all cases of employee complaints, the Occupational Safety and Health Review Commission has ruled that legislative intent and constitutional guarantees require that warrants sought pursuant to employee complaints be limited in scope whenever possible. This rift within OSHA's framework complicates enforcement of the Act's remedial statutes and generally undermines public confidence in federal administrative agencies.

Resolution of these conflicts is important since the issue directly affects thousands of employers and involves a fundamental right guaranteed under the fourth amendment. In order to alleviate the discord among the circuits and OSHA's administrative organs, and to promote sound public policy, it is imperative that this Court address and decide the issue in favor of warrants that are tailored in scope to the subject-matter of employee complaints.

ARGUMENT

I. THE NINTH CIRCUIT BELOW INTENSIFIES THE SUBSTANTIAL CONFLICT AMONG THE CIRCUITS CONCERNING THE PERMISSIBLE BREADTH OF COMPLAINT-BASED WARRANTS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT. *See Chart Appearing in Appendix as Exhibit A.*

In upholding the principle that warrants issued pursuant to employee complaints be tailored to the probable cause or "specific evidence of existing violations" that support them, the Court of Appeals for the Third Circuit reasons that it is the Act's language which mandates that such searches be restricted to the purpose of discovering whether complained-of violations exist. *Marshall v. North American Car Co.*, 626 F.2d 320, 323 (3rd Cir. 1980). By contrast, the Ninth Circuit in the case at bar as well as the Fourth Circuit in *Marshall v. Seaward International, Inc.*, 510 F. Supp. 314 (W.D. Va. 1980), *affirmed* 644 F.2d 880 (4th Cir. 1981), uphold the validity of routine "wall-to-wall" warrants in every case where they are founded upon employee complaints. 670 F.2d at 841; *Marshall v. Seaward International, Inc.*, 510 F. Supp. at 318. They do so on the theory that a correct interpretation of the Act reveals that such searches are envisioned under the employee complaint subsection (8(f)) as well as under the general inspection plan subsection (8(a)). *Id. See J.R. Simplot Co. v. OSHA*, 640 F.2d 1134, 1137-38 (9th Cir. 1980) (acknowledging split among circuits concerning scope of complaint-based warrants, but refusing to decide issue). The circuits are in agreement that subsection 8(a) of the Act, which pertains to general inspection programs, permits unlimited-scope warrants in most cases. *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d at 1313, 1323 (7th Cir. 1980).

Subsection 8(f)(1) of the Act, pertaining to inspections conducted pursuant to employee complaints, provides:

> If upon receipt of such notification [of employee complaints] the Secretary determines there are reasonable grounds to believe that such violation or danger exits, *he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists.* If the Secretary determines that there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

29 U.S.C. § 657(f)(1) (emphasis added).

The court below adopts the Secretary's interpretation of this subsection, which maintains that the phrase "this section" refers to subsection 8(a) in particular, and thus permits the type of "boilerplate" warrant authorized in the case of general inspection programs. 670 F.2d at 841.

The Ninth Circuit also bases its contention in this regard upon what it mistakenly perceives to be the holding of the Seventh Circuit in *Burkart Randall Division of Textron Inc. v. Marshall* that broad-scope warrants founded upon employee complaints are always constitutionally and legislatively justified. 670 F.2d at 840-41. Although at first glance it appears that the decision in *Textron* purports to authorize the routine issuance of unlimited-scope warrants whenever founded upon employee complaints, the opposite is in fact true. Each of the three presiding judges wrote an opinion in *Textron*. Although the court upheld the validity of an unlimited complaint-based warrant in that particular case, only one judge observed that such inspections need never be restricted in scope to the substance of employee complaints. While noting that the nature of the complaint in that particular case justified the issuance of a "boilerplate" warrant, the concurring judge declined to accept the proposition that unlimited-scope warrants are always permissible when based upon employee complaints. *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d at 1323. He instead found persuasive the reasoning of the dissenting opinion that unlimited-scope warrants founded upon employee complaints should never routinely issue, but rather should be tailored to fit the complaints upon which they are

based. *Id.* at 1327. Thus, a recognition of *Textron*'s true holding is significant because it shifts the balance in the split among the circuits in favor of limited-scope warrants. *See Chart Appearing in Appendix as Exhibit A.* The three *Textron* opinions also illustrate the discord, even within the same circuit, on the issues Hern and Youngstrom raise.

In *Marshall v. North American Car Co.*, 626 F.2d 320 (3rd Cir. 1980) the Third Circuit likewise adopts the position that warrants issued pursuant to employee complaints must be limited in scope. 626 F.2d at 323. It does so by interpreting the phrase "this section", which appears in subsection 8(f), as referring to the entirety of section 8 (which covers such matters as the time of the search, the method of notification, and the means of conducting the search), but with the exception of subsection 8(a). The Third Circuit contends that if subsection 8(f) were read as referring to subsection 8(a) alone, then the existence of subsection 8(f) would be superfluous. *Id.* By focusing solely on subsection 8(a), therefore, the Third Circuit held that the Secretary's argument (later adopted by the Ninth Circuit below) misreads the meaning of the phrase "in accordance with the provisions of this section." The Third Circuit instead interprets this phrase to mean simply that the procedure set out in the other subsections of section 8 will be followed even where the inspection is pursuant to an employee complaint.

II. THE LOWER COURT HOLDING CONFLICTS WITH A DECISION OF THIS COURT AND CONTRIBUTES TO THE CONTROVERSY AMONG THE CIRCUITS CONCERNING THE LEGITIMATE SCOPE OF COMPLAINT-BASED WARRANTS UNDER THE FOURTH AMENDMENT. *See Chart Appearing in Appendix as Exhibit A.*

A. *Administrative Probable Cause Supporting Inspection Pursuant to a General Plan is Not the Same as Criminal Probable Cause.*

This Court held in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) that a warrant is a prerequisite to a nonconsensual administrative search. Speaking for the Court, Justice White stated that:

> [An administrative warrant issued pursuant to a general plan of inspection] will not depend on [a demonstration of]

> probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. *For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or adminstrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."*

Id. at 320, *quoting Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (emphasis added).

This Court thus differentiates between searches conducted pursuant to general inspection plans and those conducted within the context of probable cause proof analogous to criminal investigations. In the case of general administrative searches, the standard of probable cause supporting the issuance of a valid search warrant is not based upon specific elements of incident-related proof that is embodied in the traditional sense of criminal probable cause. Instead, an applicant must show that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular establishment". *Id.* In the case of general administrative inspections, therefore, the standard of reasonableness is based upon a presumption of regularity derived from a predesigned administrative program subject to well-established safeguards. The balance is struck between "the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other." *Michigan v. Tyler*, 436 U.S. 499, 507 (1978). *See Camara v. Municipal Court*, 387 U.S. 523 (1967).

B. *The Circuit Courts have Confused the Standard of Probable Cause Necessary for the Issuance of Complaint-based Search Warrants*

As noted, *Barlow's* held that administrative search warrants must be issued pursuant to either of two different standards. One standard for reasonableness is based upon an administrative plan as satisfied for a particular establishment; the other is based upon "specific evidence of an existing violation." *Marshall v. Barlow's, Inc.*, 436 U.S. at 320. Whether this second standard of cause

refers to criminal probable cause, whether it refers to administrative probable cause applicable to general inspection programs, or whether it is in fact a "hybrid" of the two, is a matter which has caused disagreement among the circuits as well as discord within OSHA's administrative framework.

1. *Probable cause supporting complaint-based warrants v. criminal probable cause.*

Proponents of the theory that warrants issued pursuant to employee complaints must be supported by criminal probable cause assume that by the phrase "specific evidence of an existing violation", the *Barlow's* Court was referring to the traditional criminal probable cause standard. *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d at 1317; *Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979). The import of this reasoning is that any warrant purporting to authorize a search which is wider in scope than that necessary to determine the legitimacy of the complaint supporting it necessarily violates fourth amendment protections against unreasonable searches, inasmuch as there exists no probable cause — administrative or otherwise — constitutionally sufficient to justify the search as it relates to areas and matters not mentioned in the complaint. *Marshall v. Central Mine Equipment Co.*, 608 F.2d 719, 720 n.1 (8th Cir. 1979); *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d at 1323, *concurring opinion* at 1326, *dissenting opinion* at 1327. *See Marshall v. W & W Steel Co.*, 604 F.2d 1322, 1326-27 (10th Cir. 1979); *Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F.2d at 1335.

The Seventh Circuit has held that "specific evidence of existing violations" cannot be interpreted to refer to criminal probable cause, since the right to have the complainant's veracity guaranteed is an integral aspect of criminal probable cause which clearly does not apply in the context of administrative inspections. *Weyerheuser Co. v. Marshall*, 592 F.2d 373, 377 (7th Cir. 1979); *Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d at 1339. Although that Circuit draws this fine distinction between criminal probable cause and administrative probable cause applicable to complaint-based warrants, it nevertheless maintains that the scope of such warrants must bear an

appropriate relation to the complaints which found them. Hence the standard of probable cause supporting warrants issued pursuant to employee complaints should be interpreted as embracing exactly what this Court and the Congress said that it embraced: "specific evidence of existing violations". *Marshall v. Barlow's, Inc.*, 436 U.S. at 320. A valid warrant issued pursuant to an employee complaint must, therefore, be supported by no more nor less than "specific evidence of an existing violation". *See Weyerhauser Co. v. Marshall*, 592 F.2d at 378 (emphasizing the importance of specificity in warrants and decrying the use of "boilerplate" language in warrant applications). This standard is analogous to criminal probable cause.

2. *Probable cause supporting complaint-based warrants v. administrative probable cause*

By contrast, another line of authority holds that complaint-based warrants need only be supported by a "relaxed" administrative probable cause which is adequate to support warrants issued pursuant to general inspection programs. *See Marshall v. Seaward International, Inc.*, 510 F. Supp. 314, 317 (W.D. Va. 1980), *affirmed*, 644 F.2d 880 (4th Cir. 1981); *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d at 1318-19; *Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d at 1338. Of the circuits adopting this approach, only the court below and the Fourth Circuit uphold the routine issuance of broad administrative warrants founded upon employee complaints. *See* 670 F.2d at 840-41; *Marshall v. Seaward International, Inc.*, 510 F. Supp. at 318.

Although the Fourth, Seventh, and Ninth Circuits maintain that a "relaxed" standard of administrative probable cause applies to both types of OSHA searches, as indicated above, the Seventh Circuit nevertheless recognizes the principle of limited-scope warrants. *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d, *concurring opinion* at 1326, *dissenting opinion* at 1327. *See Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d at 1343. *Cf. Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981) (adopting *Barlow's* administrative probable cause standard as correct standard in Immigration and Naturalization Service warrants but requiring limitation in scope whenever possible). The theory underlying

the Seventh Circuit's reasoning recognizes that even the administrative probable cause standard requires that all inspections be reasonable, i.e., that the public interest in these inspections outweigh the invasion of privacy which they entail. In order to be reasonable, that circuit holds that the scope of an inspection must not exceed the scope of the evidence used to establish the cause — criminal, administrative, or otherwise — which constitutionally justifies the invasion. *Id.*

III. THE COURT BELOW EXACERBATES THE EXISTING CONFLICT BETWEEN THE SECRETARY AND THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION. *See Chart Appearing in Appendix as Exhibit A.*

A. *The Secretary's Interpretation of Section 8 Conflicts with an Occupational Safety and Health Review Commission Ruling.*

As indicated above, the Secretary interprets the language in section 8 of the Act as justifying broad-scope searches in all cases where the inspection is conducted pursuant to employee complaints. The Secretary also points to a regulation which states that warrants issued on the basis of employee complaints may authorize a search that is not limited to the area in the complaint. *See* 29 C.F.R. § 1903.11(b), (text at 4, *supra*). This conclusion directly conflicts with a ruling of the Occupational Safety and Health Review Commission (OSHRC). Although the Secretary's interpretation of the Act by virtue of his regulations are entitled to deference, *Whirlpool Corporation v. Marshall*, 445 U.S. 1, 11 (1980); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), it may not exceed the statutory limits imposed by Congress, nor contravene opposite conclusions reached by this Court. *Marshall v. Huffhines Steel Co.*, 488 F. Supp. 988, 1000 (N.D. Tex. 1979), *affirmed*, 645 F.2d 288 (5th Cir. 1981); *Cerro Metal Products v. Marshall*, 467 F. Supp. 869, 877-79 (E.D. Pa. 1979), *affirmed*, 620 F.2d 964 (3rd Cir. 1980). Accordingly, OSHRC held that routine "wall-to-wall" inspections conducted pursuant to employee complaints are invalid.

B. *The Occupational Safety and Health Review Commission Has Ruled that Complaint-Based Warrants Must Be Limited in Scope.*

In deciding the issue of the permissible scope of warrants issued pursuant to employee complaints, the OSHRC in *Sarasota Concrete Co.*, (1979) OSHRC Docket No. 78-5264, 1979 CCH OSHD ¶ 23,839, stated that "a warrant issued solely upon an employee complaint and directed to a specific hazard is not broad enough to authorize an overall inspection". *Id.* at ¶ 23,841. *See* App., Exh. M. The OSHRC judge went on to hold that unlike the situation in *Barlow's*, there was no showing that the defendant was chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources. The Commission accordingly concluded that no probable cause was established to authorize the Secretary to go beyond the specifics detailed in the complaint supporting his application for the warrant. By adopting the Secretary's position, which clearly conflicts with the OSHRC's ruling, the court below intensifies the rift between these two OSHA organs, thereby undermining public confidence in OSHA rulings.

IV. RESOLUTION OF THE CONFLICT IS IMPORTANT TO THE GOVERNMENT AND THOUSANDS OF EMPLOYERS

A. *The Issues are of Such Importance that This Court's Decision Will Affect the Fundamental Rights of Thousands Across All Levels of Industry and Commerce.*

Thousands of employers will be affected by a final determination of the permissible scope of complaint-based warrants, which alone is sufficiently compelling to require this Court's consideration of the issue. Perhaps more compelling, however, is the nature of the question as bearing upon fundamental rights guaranteed under the Fourth Amendment of the United States Constitution. It is the intrinsic importance of this latter reason which renders a ruling by the Supreme Court imperative. Defendant Hern's "strong moral objection" to the propriety of such inspections, made with indifference to the $1,000 fine for contempt, underscores this point.

In addition to misreading *Barlow's* and the Act as authorizing routine issuance of "wall-to-wall" warrants founded upon employee complaints, the Ninth Circuit concluded that the issuing magistrate had no information indicating that the Hern foundry was a multi-faceted establishment. Thus, the court below reasoned, a broad "boilerplate" warrant was justified. There is no finding of the district court, however, which warrants the Ninth Circuit's ipse dixit inference. On its face, the warrant application instead indicates that Hern's business premises includes more than one building. Similarly, the court below misinterprets the holding of the Seventh Circuit in *Burkart Randall Division of Textron v. Marshall* concerning the permissible scope of complaint-based warrants. Such clear mistakes of law beg clarification by this Court.

B. *The Practical Effect of the Decision Below in Compounding Judicial Discord and Administrative Bickering Undermines Public Faith in Federal Judicial and Administrative Organs.*

One consequence of the lower court's decision for future litigants, at least with respect to warrants issued within the jurisdiction of the Ninth Circuit, is that employers will be at the mercy of OSHA. Any time a compliance officer receives the most trivial complaint, even when it relates to an employer whose activities are multi-faceted and geographically diversified, OSHA will be given a free hand to conduct a comprehensive search of all establishments, regardless of either the legitimacy or the particularized nature of the complaint. Moreover, if such is permitted within the context of OSHA inspections, no logical reason exists that will prevent other administrative agencies from following suit. *See Public Service Co. of Indiana, Inc. v. United States Environmental Protection Agency*, 509 F. Supp. 720 (S.D. Ind. 1981) (whether agency inspection is pursuant to general program or to employee complaint is immaterial insofar as level of probable cause required to support an EPA warrant is concerned). Consequently, building inspectors, fire inspectors, or EPA officers will be justified in conducting a comprehensive inspection of all buildings, grounds, and documents of any individual or commercial establishment, no matter how extensive, simply upon the basis of a disgruntled complainant who alleges a minor violation.

The conflict between the Secretary of Labor and the OSHRC with respect to this issue likewise compels adjudication by the highest Court in the land. Should this rift in the OSHA framework remain unattended, public faith in the structural integrity of federal administrative agencies will be eroded.

Given this quagmire of judicial discord and administrative bickering, it is vital that this Court promulgate a uniform decision in order that all employers may know where they stand, legally and constitutionally, with respect to "wall-to-wall" warrants that routinely issue pursuant to employee complaints.

CONCLUSION

For these reasons, the Petition for Writs of Certiorari should be granted.

Respectfully submitted,

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BREAKDOWN OF AUTHORITY

UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT	
COMPLAINT-BASED WARRANTS MUST BE LIMITED IN SCOPE WHENEVER POSSIBLE	**COMPLAINT-BASED WARRANTS MAY ALWAYS BE UNLIMITED IN SCOPE**
Supreme Court:	*Supreme Court:*
D.C. Circuit:	*D.C. Circuit:*
First Circuit:	*First Circuit:*
Second Circuit:	*Second Circuit:*
Third Circuit: *Marshall v. North American Car Co.*, 626 F.2d 320, 323 (3rd Cir. 1980) *Donovan v. National Bank of America, Inc.*, 516 F. Supp. 674, 678 (E.D. Penn. 1981)	*Third Circuit:*
Fourth Circuit:	*Fourth Circuit:* *Marshall v. Seaward International, Inc.*, 510 F. Supp. 314, 318 (W.D. Va. 1980), *affirmed*, 644 F.2d 880 (4th Cir. 1981)
Fifth Circuit: *Marshall v. Pool Offshore Co.*, 467 F. Supp. 978, 981 (W.D. La. 1979) *Matter of Establishment Inspection of Asarco*, 506 F. Supp. 350, 353, (N.D. Tex. 1981)	*Fifth Circuit:*
Sixth Circuit:	*Sixth Circuit:*
Seventh Circuit:	*Seventh Circuit:* *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1326 (7th Cir. 1980) (minority opinion on this issue)
Eighth Circuit:	*Eighth Circuit:*
Ninth Circuit: *Donovan v. Burlington Northern, Inc.*, 521 F. Supp. 99, 102 (D. Mont. 1981)	*Ninth Circuit:* *Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838, 840-41 (9th Cir. 1982)
Tenth Circuit: *Marshall v. Trinity Industries, Inc.*, 1979 OSHD 29,038, ¶ 23,943 (W.D. Okla., Oct. 15, 1979)	*Tenth Circuit:*
Eleventh Circuit:	*Eleventh Circuit:*
OSHA: *Sarasota Concrete Co.*, 1979 OSHA ¶ 23,839 (OSH Rev. Comm'n., Sept. 9, 1979)	*OSHA:* OSHA Regulation at 29 C.F.R. § 1903.11

BREAKDOWN OF AUTHORITY

UNDER THE FOURTH AMENDMENT	
COMPLAINT-BASED WARRANTS MUST BE LIMITED IN SCOPE WHENEVER POSSIBLE	**COMPLAINT-BASED WARRANTS MAY ALWAYS BE UNLIMITED IN SCOPE**
Supreme Court: ***Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978)** ***Michigan v. Tyler*, 436 U.S. 499, 507 (1978)**	*Supreme Court:*
D.C. Circuit: ***Cf. Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981)**	*D.C. Circuit:*
First Circuit:	*First Circuit:*
Second Circuit: ***Marshall v. Wollaston Alloys, Inc.*, 479 F. Supp. 1102, 1104 (D. Mass. 1979)**	*Second Circuit:*
Third Circuit: ***Marshall v. North American Car Co.*, 476 F. Supp 698, 707 (M.D. Penn. 1979), *affirmed*, 626 F.2d 320 (3rd Cir. 1980)** ***BP Oil, Inc. v. Marshall*, 509 F. Supp. 802, 808 (E.D. Penn. 1981)** ***Donovan v. Metal Bank of America, Inc.*, 516 F. Supp 674, 679 (E.D. Penn. 1981)** ***Marshall v. Berwick Forge and Fabricating Co.*, 47[illegible] Supp. 104, 113 (M.D. Penn. 1979)** ***Marshall v. Consolidated Rail Corp.*, 1979 OSHD 29,283, ¶ 24,101 (W.D. Pa. Dec. 13, 1979)**	*Third Circuit:*
Fourth Circuit:	*Fourth Circuit:* ***Marshall v. Seaward International, Inc.*, 510 F. Supp. 314, 318 (W.D. Va. 1980), *affirmed*, 644 F.2d 880 (4th Cir. 1981)**
Fifth Circuit: ***Marshall v. Pool Offshore Co.*, 467 F. Supp. 978, 982 n. 4 (W.D. La. 1979)** ***Matter of Establishment Inspection of Asarco*, 508 F. Supp. 350, 353, (N.D. Tex. 1981)**	*Fifth Circuit:*
Sixth Circuit:	*Sixth Circuit:*
Seventh Circuit: ***Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980) (concurring opinion at 1326; dissenting opinion at 1327) (majority opinion on issue)** ***Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F.2d 1335, 1343 (7th Cir. 1979), *cert. denied*, 444 U.S. 884 (1979)** ***Weyerhaeuser Co. v. Marshall*, 592 F.2d 373, 378 (7th Cir. 1979)** ***Matter of Establishment Inspection of Marsan Co., Inc., a Corp.*, 1979 OSHD 28,933, ¶23,856 (N.D. Ind., June 21, 1979)**	*Seventh Circuit:* ***Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1324 (7th Cir. 1980) (minority opinion on this issue)**
Eighth Circuit: ***Marshall v. Central Mine Co.*, 608 F.2d 719, 720 n. 1 (8th Cir. 1979)**	*Eighth Circuit:*
Ninth Circuit: ***Donovan v. Burlington Northern, Inc.*, 521 F. Supp. 99, 102 (D. Mont. 1981)**	*Ninth Circuit:* *Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838, 840-41 (9th Cir. 1982)
Tenth Circuit: ***Marshall v. Wand W Steel Co., Inc.*, 604 F.2d 1322, 1326-27 (10th Cir. 1979)** ***Marshall v. Trinity Industries, Inc.*, 1979 OSHD 29,038, ¶ 23,943 (W.D. Okla., Oct. 15, 1979)**	*Tenth Circuit:*
Eleventh Circuit:	*Eleventh Circuit:*
OSHA: ***Sarasota Concrete Co.*, 1979 OSHD 28,917, ¶ 23,839 (OSH Rev. Comm'n., Sept. 9, 1979)**	*OSHA:* **OSHA Regulation at 29 C.F.R. § 1903.11**

EXHIBIT B

In the Matter of Establishment of Inspection of:
HERN IRON WORKS, INC.,
Respondent-Appellant,

v.

Raymond J. DONOVAN,
Secretary of Labor, U.S. Department of Labor,
Petitioner-Appellee.

No. 80-3440

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 8, 1981.
Decided March 1, 1982.

Employer appealed from contempt order entered against it by the United States District Court for the District of Idaho, Ray McNichols, J., for failure to honor an Occupational Safety and Health Administration warrant. The Court of Appeals, Skopil, Circuit Judge, held that: (1) probable cause for issuance of inspection warrant was not stale, and (2) inspection warrant was not overbroad.

Affirmed.

1. Labor Relations ⇐ 32

Inspection warrant issued under the Occupational Safety and Health Act based upon an employee complaint issued 15 months earlier was not based on stale probable cause particularly since employer, through its own occlusive tactics, was chiefly responsible for 15-month delay of which it complained. Occupational Safety and Health Act of 1970, § 8(f)(1), 29 U.S.C.A. § 657(f)(1).

2. Labor Relations ⇐ 32

An employee complaint alleging safety hazards in "metal pouring area" of employer foundry supported warrant to search entire foundry in light of fact that affidavit verifying employee complaint alleged safety hazards including ventilation defects in

foundry and magistrate could reasonably have inferred that inspection of entire establishment was necessary to detect ventilation hazards and there was no information before the magistrate indicating that foundry was a multifaceted establishment or that it was of such a large size that full-scale inspection of premises was unreasonable. Occupational Safety and Health Act of 1970, § 8(f)(1), 29 U.S.C.A. § 657(f)(1).

Terry E. Coffin, Runft & Longeteig, Boise, Idaho, for respondent-appellant.

Ann D. Nachbar, Charles I. Hadden, Allen H. Feldman, T. Timothy Ryan, Jr., Benjamin W. Mintz, Washington, D. C., for petitioner-appellee.

Appeal from the United States District Court for the District of Idaho.

Before KILKENNY, GOODWIN, and SKOPIL, Circuit Judges.

SKOPIL, Circuit Judge:

Hern Iron Works appeals a contempt order entered against it for failure to honor an OSHA inspection warrant. The contempt order is affirmed.

FACTS AND PROCEEDINGS BELOW

Hern Iron Works, Inc., ("Hern") operates a foundry in Coeur d'Alene, Idaho. On March 23, 1979 a Hern employee filed a complaint with the Occupational Safety & Health Administration ("OSHA").[1] The complaint alleged that (1) employees in the metal pouring section of the plant were required to pour molten metal without instructions, and without protective clothing, or equipment, and (2) there was no ventilation in the foundry area.

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[1] The complaint was filed pursuant to 29 U.S.C. § 657(f)(1) (§ 8(f) of the Occupational Safety & Health Act of 1979).

Because Hern had a history of not consenting to OSHA inspections,[2] the government obtained a full scope inspection warrant. When the warrant was served on April 18, 1979, Hern denied entry to OSHA officer Ronald Stokes. In early June 1979, the Department of Labor applied for an enforcement order. The district court denied the order because the warrant had been improperly issued to John Hern rather than to Hern Iron Works, Inc.

OSHA obtained a second warrant on June 22, 1979 based on the employee complaint of March 1979. When Hern refused to honor the warrant, the Department of Labor in August 1979 applied for an order to show cause re contempt. After postponements of nearly nine months, none due to the government, a hearing was held on June 9, 1980. Again the district court declined to find contempt—this time because of improper service of the warrant.

On June 16, 1980 the government again obtained a full scope warrant based on the employee complaint of March 1979. When served with the warrant, Mr. John Hern stated that he would "sell [his] place" before allowing an OSHA inspection. At a hearing on August 11, 1980 Hern, appearing pro se, repeated "strong moral objections to the OSHA Act." He argued that there was no probable cause for issuance of a warrant, and that the warrant was overbroad.

A contempt order issued and Hern was fined $1,000. After obtaining a stay pending appeal, Hern filed timely notice of appeal on August 14, 1980.

ISSUES

1. WAS THE JUNE 16, 1980 INSPECTION WARRANT BASED UPON STALE PROBABLE CAUSE?

2. WAS THE JUNE 16, 1980 INSPECTION WARRANT OVERBROAD?

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[2] Hern had not allowed warrantless entries by OSHA compliance officers on February 20, 1975 and on March 30, 1978. (A brief inspection was conducted, however, July 8-9, 1975 in response to a court order.)

DISCUSSION

I. PROBABLE CAUSE FOR ISSUANCE OF THE JUNE 16, 1980 INSPECTION WARRANT.

[1] Hern contends that the employee complaint dated March 16, 1979 could not provide probable cause for issuance of a warrant on June 16, 1980, some 15 months later. In support of this position, Hern relies on cases pertaining to standards of probable cause for issuance of search warrants in criminal proceedings. *See, e.g., Sgro v. United States*, 287 U.S. 206, 211-12, 53 S.Ct. 138, 140; 77 L.Ed. 260 (1932); *Schoeneman v. United States*, 317 F.2d 173, 177 (D.C.Cir.1963).

In *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), however, the Supreme Court held that warrants for OSHA inspections need not be based on "probable cause in the criminal law sense." *Id.* at 320, 98 S.Ct. at 1824. Subsequently "virtually every federal court . . . has concluded that criminal probable cause is not required for issuance of a warrant for an OSHA inspection based on employee complaints." *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1318 n.6 (7th Cir. 1980). *See Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283, 1287-88 (9th Cir. 1979).

In determining the degree of simultaneity needed for filing of an employee complaint and issuance of an OSHA warrant, courts have applied a more relaxed standard of probable cause than that required for criminal warrants. *See, e.g., Burkart, supra*, 625 F.2d at 1322 (employee complaints received six months and five months prior to issuance of OSHA warrant "did not render . . . information stale."); *B. P. Oil, Inc. v. Marshall*, 509 F.Supp. 802, 806 (E.D. Pa.1981) (not necessary to show that violation was in existence at precise time warrant issued); *In the Matter of the Inspection of Central Mine Equipment Co.*, 7 OSHC (BNA), 1185, 1189 (E.D.Mo.), *vacated on other grounds*, 7 OSHC (BNA) 1907 (8th Cir. 1979) (upholding OSHA warrant based on information eight months old).

In *Federal Casting Div. Chromalloy American Corp. v. Donovan*, 514 F.Supp. 617, 618-19 (E.D.Wis.1981) a Wisconsin

district court upheld a foundry inspection warrant, pursuant to a general administrative plan, based on a 32-month-old complaint, stating:

> "It seems clear that companies cannot be allowed to prevent inspections by litigating the validity of a warrant through every available channel, and then when the warrant is upheld, avoid the inspection by litigating whether a once-valid warrant has become stale. If that were the law and were OSHA required to obtain a second 'fresh' warrant, nothing would prevent . . . additional years of litigation on the second warrant. To allow such a result would thwart the essential purposes of the Occupational Safety and Health Act of 1970 which was 'to assure so far as possible every working-man and woman in the nation safe and healthful working conditions.' "

The court recognized, however, that "[i]f the warrant had been based on a specific employee complaint, the company's arguments derived from the criminal law on the staleness of warrants would have more force." *Id.* at 619.

Although the warrant here issued pursuant to a specific complaint, Hern's contention of staleness has little merit. While the government was careless in drafting the first warrant and serving the second, Hern, through its own occlusive tactics, was chiefly responsible for the 15-month delay of which it now complains.

We conclude that the employee complaint of March 16, 1979 supported issuance of the June 16, 1980 warrant.

II. BREADTH OF THE JUNE 16, 1980 INSPECTION WARRANT.

Hern contends that the employee complaint alleging safety hazards in the "metal pouring area" does not support a warrant to search the entire Hern foundry.

In *J. R. Simplot Co. v. OSHA*, 640 F.2d 1134 (9th Cir. 1981), the Ninth Circuit upheld a full-scale OSHA inspection based on an employee complaint noting that circuits have reached inconsistent results in addressing the issue whether such an

inspection "must be restricted to the complained of site." *Id.* at 1137. In *Marshall v. North American Car Co.*, 626 F.2d 320, 324 (3d Cir. 1980) the Third Circuit concluded that "where an OSHA inspection is conducted under § 8(f) pursuant to an employee complaint, the scope of the inspection must bear an appropriate relationship to the violations alleged in the complaint." By contrast, the Seventh Circuit in *Burkart, supra,* 625 F.2d at 1325 held that "where probable cause to conduct an OSHA inspection is established on the basis of employee complaints, the inspection need not be limited in scope to the substance of those complaints."[3]

Declining to formulate a general rule for scope of OSHA warrants, the *Simplot* court stated that, "facts here require us to do no more than determine the legitimate breadth of the warrant issued by the district court." *Simplot, supra,* 640 F.2d at 1138. In reviewing the warrant application the court determined that the district court had reasonably inferred that the Simplot plant was located in a single facility. A warrant authorizing inspection of the entire Simplot plant was therefore not found to be overbroad.

[2] Turning to the warrant application in the instant case, we find no lack of reasonableness in the magistrate's issuance of a warrant to search the entire Hern foundry. The June 12, 1980 application was "in response to an employee safety and health complaint submitted pursuant to section 8(f)(1) of the Act *and as a part of an inspection program designed to assure compliance with the Act.*"[4] (emphasis added.) The affidavit verifying the employee complaint alleged safety hazards including ventilation

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[3] Decisions from district and administrative law courts have been equally divided. *Compare Public Service Co., Inc. v. United States EPA,* 509 F.Supp. 720 (S.D.Ind.1981) (upholding broad search) *with Matter of Establishment Inspection of Asarco, Inc.,* 508 F.Supp. 350, 353 (N.D.Tex.1981) ("Section 8(f)(1) must bear an appropriate relationship to the violations alleged in the underlying employee complaints.") *Compare* Sarasota Concrete Co. 1979 OSHD ¶ 23,839 (OSH Rev. Comm'n, Sept. 9, 1979), *with* Seaward Int'l, Inc., 1979 OSHD ¶ 24,794 (W.D.Va., Sept. 19, 1980).

[4] OSHA Instruction CPL 2.12A establishes guidelines for evaluating employee complaints. Under section F2 officers are "to determine the nature and severity of the hazard; the number of employees potentially exposed; and any injuries, illnesses, or symptoms attributable to the hazard." If "[a] thorough evaluation of a complaint does not establish 'reasonable grounds to believe a violation or danger exists,' " . . . [or] "[a]s a result of a recent inspection or on the basis of

defects in the foundry. The magistrate could reasonably have inferred that inspection of the entire Hern establishment was necessary to detect ventilation hazards. Further, there was no information before the magistrate indicating that the Hern foundry was a multi-faceted establishment or that it was of such a large size that full-scale inspection of the premises was unreasonable.[5]

The Supreme Court has cautioned that "[d]elineating the scope of a search . . . is particularly important where documents are involved." *Barlow's, supra,* 436 U.S. at 324, 98 S.Ct. at 1826 n.22; *Blocksom & Co. v. Marshall,* 582 F.2d 1122, 1125 (7th Cir. 1978). We note that inspection of documents in the instant case was properly restricted to those "records, files, papers . . . bearing on whether this employer is . . . furnishing to its employees . . . a place of employment which [is] free from recognized hazards that are causing or likely to cause death or serious physical harm."

CONCLUSION

Facts of the instant case viewed in light of OSHA's purpose in promoting employee safety persuade us to adopt the reasoning of the Seventh Circuit: "[T]he better view is that which permits,

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other objective evidence, the Area Director determines that the hazard which is the subject of the complaint is not present or has been corrected," then no inspection will be conducted. (Section H2a-c). These guidelines protect commercial property owners from "unbridled discretion [of] executive and administrative officers." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323, 98 S.Ct. 1816, 1825, 56 L.Ed.2d 305 (1978), by assuring that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967).

[5] While the Supreme Court has acknowledged that "the expectation of privacy . . . the owner of commercial property enjoys . . . differs significantly from the sanctity accorded an individual's home. [sic]" *Donovan v. Dewey,* _____ U.S. _____, _____, 101 S.Ct. 2534, 2538, 69 L.Ed.2d 262, 269 (1981), the Court has repeatedly underscored the requirement of reasonableness in administrative searches. *See Donovan v. Dewey, supra; Marshall v. Barlow's, Inc., supra,* 436 U.S. at 315-16, 98 S.Ct. at 1821; *Camara v. Municipal Court, supra,* 387 U.S. at 539, 87 S.Ct. at 1736; *See v. Seattle,* 387 U.S. 541, 544-45, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967).

absent extraordinary circumstances, general inspections in response to employee complaints." *Burkart, supra,* 625 F.2d at 1324.

The contempt order of the district court is AFFIRMED.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In the Matter of	)	
	)	
Establishment Inspection of:	)	CIVIL NO. M-N-2017
	)	
HERN IRON WORKS, INC.	)	**ORDER OF CONTEMPT**
Atlas Road	)	
Coeur d'Alene, Idaho	)	
	)	

The Court having heretofore stated its findings of fact and conclusions of law finding that the Respondent, Hern Iron Works, Inc., is in contempt of an Order of this Court, now there,

IT IS THEREFORE ORDERED

1) The Respondent, Hern Iron Works, Inc., is found in contempt of this Court for its deliberate refusal to obey a Warrant for Inspection issued by this Court;

2) The Respondent, Hern Iron Works, Inc., shall pay a fine of $1,000.00;

3) The Warrant for Inspection issued by this Court on June 16, 1980, shall remain in effect until further order of this Court; and

4) The fine of $1,000.00 shall be set aside if, within ten days of entry of this Order, the Respondent indicates by advice both to the Court and counsel for the applicant its willingness to obey the Warrant for Inspection.

Dated August 14th, 1980.

/s/ Ray McNichols
RAY McNICHOLS
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ William W. Kates
William W. Kates

EXHIBIT D

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
Office of the Solicitor
U.S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In the Matter of	)	
	)	CIVIL NO. M-S-2327
Establishment Inspection of	)	
	)	
LEWIS YOUNGSTROM, an	)	
individual, doing business as	)	**ORDER OF CONTEMPT**
YOUNGSTROM'S LOG HOMES	)	
U.S. Highway 91	)	
Blackfoot, Idaho	)	
	)	

This matter having come on for hearing on April 13, 1981, upon the Application of the Secretary of Labor, United States Department of Labor, for an Order finding the Respondent, Lewis Youngstrom, an individual doing business as Youngstrom's Log Homes, in contempt of Court, and the Court having heretofore stated its findings of fact and conclusions of law,

IT IS THEREFORE ORDERED:

1) The Respondent, Lewis Youngstrom, an individual doing business as Youngstrom's Log Homes, is in contempt of this Court for his deliberate refusal to obey a Warrant for Inspection issued by this Court;

2) The Respondent shall pay a fine, which is hereby imposed, of $500.00 for such contempt;

3) The Warrant for Inspection issued by this Court on December 1, 1980, shall remain in effect until further order of this Court;

4) The imposition of the fine of $500.00 shall be suspended during the pendency of any appeal of this Order;

5) The Respondent may purge himself of contempt, and the fine of $500.00 shall then be set aside, through allowing a safety and health inspection of his worksite to be conducted as authorized by the Warrant for Inspection.

Dated April 17, 1981.

/s/ Fred M. Taylor
Fred M. Taylor
United States District Judge

Presented by:

/s/ William W. Kates
William W. Kates

EXHIBIT E

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
U.S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

In the Matter of	)	
	)	
Establishment Inspection of:	)	CIVIL NO. M-N-2017
	)	
HERN IRON WORKS, INC.	)	**APPLICATION FOR**
	)	**REISSUANCE**
		OF INSPECTION
Atlas Road	)	**WARRANT**
Coeur d'Alene, Idaho	)	
	)	

COMES NOW Ray Marshall, Secretary of Labor, United States Department of Labor, acting through the Occupational Safety and Health Administration, by and through the undersigned Attorney, and applies to this Court for the reissuance of an inspection warrant pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*), hereinafter referred to as the Act, and in support of such Application alleges, upon information and belief, as follows:

1. That this Court, in response to an earlier Application for an Inspection Warrant (dated June 14, 1979) issued a Warrant for Inspection on June 22, 1979, against HERN IRON WORKS, INC., the Respondent herein. Such Warrant for Inspection was not properly served upon a responsible managing official of the corporate Respondent in a

manner sufficient for the Warrant for Inspection to be further enforced by this Court, whether by contempt proceedings or otherwise. For that reason this Application for the reissuance of a Warrant for Inspection against the Respondent, HERN IRON WORKS, INC., is being made.

2. That Hern Iron Works, Inc., is a corporation duly organized and existing under the laws of the State of Idaho and is engaged in the operation of a worksite and business located on Atlas Road approximately two miles north of the Atlas Tie Plant in Coeur d'Alene, Idaho (with a mailing address of Route 1, Box 240, Coeur d'Alene, Idahc 83814), where work is performed by employees of the employer engaged in the operation of a foundry at which moulded iron castings of various sizes and shapes are produced for customers both within and outside the State of Idaho, such castings including grates, parts for stoves and miniature cannons, and is otherwise engaged in a business affecting commerce within the meaning of Section 3 of the Act. This has been true at all times pertinent hereto.

3. That the desired inspection and investigation are contemplated in response to an employee safety and health complaint submitted pursuant to Section 8(f)(1) of the Act and as a part of an inspection program designed to assure compliance with the Act and are authorized by Section 8(a) of the Act, all as more fully described in the affidavit of Donald R. Brzowski, on file herein (such Affidavit having been previously filed with the Court as an attachment to the initial Application for an Inspection Warrant dated April 9, 1979).

4. That the inspection and investigation will be conducted during regular working hours or at other reasonable times, within reasonable limits, and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor at 29 C.F.R. Part 1903. Appropriate credentials as representatives of the Occupational Safety and Health Administration, U.S. Department of Labor, hereinafter referred to as representatives, will be presented to the employer, and the inspection

and investigation will be commenced as soon as practicable after the issuance of this warrant and will be completed with reasonable promptness.

5. That the inspection and investigation will extend to the aforesaid establishment or other area, workplace, or environment where work is performed by employees of the employer, and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations and orders pursuant to the Act.

6. That the representatives may be accompanied by one or more employees of the employer, pursuant to Section 8(e) of the Act.

7. That a return will be made to the Court at the completion of the inspection and investigation.

WHEREFORE, applicant prays that this Court enter a Warrant for Inspection in the form as annexed hereto.

DATED this 12th day of June, 1980.

Carin A. Clauss
Solicitor of Labor

Daniel W. Teehan
Regional Solicitor

Robert A. Friel
Associate Regional Solicitor

William W. Kates
Attorney

By /s/William W. Kates
William W. Kates
U.S. Department of Labor

EXHIBIT F

AFFIDAVIT

STATE OF IDAHO)
) ss.
COUNTY OF KOOTENAI)

DONALD R. BRZOWSKI, being first duly sworn on oath, deposes and says:

1. That I am now and at all times material hereto have been a Compliance Safety and Health Officer of the Occupational Safety and Health Administration (OSHA), United States Department of Labor, with offices at 205 North First Street in Coeur d'Alene, Idaho. My duties and responsibilities as a Compliance Safety and Health Officer include the making of safety and health inspections of worksites under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. sections 651 *et seq.*), hereinafter referred to as the "Act".

2. That on June 29, 1979, I went in the normal course of my duties to the work establishment maintained by Hern Iron Works, Inc., located on Atlas Road in Coer [sic] d'Alene, Idaho. The purpose of our visit was to serve a Warrant for Inspection which had been issued on June 22, 1979, against the aforesaid employer and to conduct a safety and health inspection of such establishment, in accordance with the Warrant for Inspection and pursuant to authority of section 8 of the Act and instructions from the Area Director, Boise, Idaho area office.

3. Upon my arrival at the worksite at approximately 10:00 a.m., I entered the office building and after giving my name and identifying myself as being with OSHA, I asked the office lady if I could see Mr. John A. Hern, Jr., the person with whom I had dealt in my previous inspection activities at the worksite. She stated that Mr. Hern was in the foundry building and attempted to call him there. When there was no response to her call, she asked another gentleman in the office if he would go to the foundry and try to locate Mr. Hern. Shortly thereafter that gentleman

returned to the office and said that he could not find Mr. Hern. After another unsuccessful call to the foundry building, I asked the office lady who was in charge in Mr. Hern's absence. She indicated the gentleman who had earlier gone to the foundry to try to locate Mr. Hern. I then asked that gentleman, who identified himself as Mr. Dan Brockway, the sales manager of the firm, if I could speak with him and we went into his office. I then introduced myself to Mr. Brockway and presented to him my credentials as an OSHA Compliance and Safety Officer. I informed Mr. Brockway that I had in my possession a warrant authorizing a safety and health inspection of the worksite and I asked him if in Mr. Hern's absence he would permit me to make the inspection. Again he stated that he would go to the foundry to try to locate Mr. Hern. When Mr. Brockway returned and stated that he still could not find Mr. Hern, I presented to him a copy of the Warrant for Inspection and again asked if he would permit me to make the inspection. Mr. Brockway said that he could not as he did not have the authority to permit it. I said that I would have to accept his comments as a refusal to honor the warrant. After noting the refusal in my report, I gave Mr. Brockway one of my business cards so that Mr. Hern could call me if he had any questions. I then left the worksite at approximately 10:40 a.m.

4. I returned to the worksite at approximately 1:30 p.m. that afternoon in a further attempt to see Mr. Hern and make the inspection. When the office lady told me that Mr. Hern was not at the worksite, I asked to see Mr. Brockway. I asked him if he had had a chance to discuss my visit earlier that morning with Mr. Hern. He said that he had and that Mr. Hern said that he would handle the matter himself. I then asked Mr. Brockway if his position (namely, that of refusing to permit a safety and health inspection) was the same, and he said that it was. I said that I had expected that Mr. Hern would call me. Mr. Brockway said that Mr. Hern had been "under the weather" for the past few days and was at home now because of that. Mr. Brockway also

said that Mr. Hern had told him that he had done the correct thing by refusing to permit an inspection. At this point I again left the premises.

5. My entry into the worksite for the purpose of making a safety and health inspection was not refused by reason of unreasonable time, limit, manner, or any other basis provided for by the Act, but was refused solely for reasons stated above. At all times, Mr. Brockway was polite and cordial in his dealings with me and I served the Warrant for Inspection and attempted to make the safety and health inspection.

Dated July 16, 1979

/s/ Donald R. Brzowski
Donald R. Brzowski

SUBSCRIBED AND SWORN to before me this 16 day of July, 1979.

/s/
NOTARY PUBLIC in and for the State of Idaho, residing in Kootenai Co., Id.

My Commision expires: 10-26-79

EXHIBIT G

This form is prepared for the assistance of any complainant and is not intended to constitute the exclusive means by which a complaint may be registered with the U.S. Department of Labor.

Form Approved
O.M.B. No 044R144

Sec. 8(i)(1) of the Williams-Steiger Occupational Safety and Health Act, 29 U.S.C. 651, provides as follows: Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

NOTE: Section 11 (c) of the Act provides explicit protection for employees exercising their rights, including making safety and health complaints.

	For Official Use Only		
	Area	Date Received	Time
	0160	3/23/79	2:30 P
	Region	Received By	Formal ☐
	10	LL	Non Formal ☑

The undersigned *(check one)*

☐ Employee ☑ Representative of Employee ☐ Other *(specify)* _____

believes that a violation at the following place of employment of an occupational safety or health standard exists which is a job safety or health hazard.

Employer's Name
Hern Iron Works

Employer's Address *(Street)* *(City)*
Atlas Road Coeur d'Alene

(State) (Zip Code) Telephone
Idaho

1. Kind of business
Foundry

2. Specify the particular building or worksite where the alleged violation is located, including address.

Metal pouring section of plant

3. Specify the name and phone number of employer's agent(s) in charge.

plant manager

4. Describe briefly the hazard which exists there including the approximate number of employees exposed to or threatened by such hazard.

1. Without instruction or protective equipment or clothing employees required to pour molten metal

No ventilations system in the foundry area

5. (a) To your knowledge is this condition being considered by any other Government agency, or has it been considered by any other Government agency?

Yes ☐ No ☑

5. (b) If yes, and you know, which Government agency?

6. Has this condition been brought to the attention of the employer?

Yes ☐ No ☐ Don't know ☑

7. Please indicate your desire.

☑ I *do not* want my name revealed to the employer. ☐ My name *may be* revealed to the employer.

EXHIBIT H

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
U.S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

In the Matter of	)	
	)	
Establishment Inspection of:	)	CIVIL NO. M-N-2017
	)	
HERN IRON WORKS, INC.	)	**WARRANT FOR**
Atlas Road	)	**INSPECTION**
Coeur d'Alene, Idaho	)	
_____	)	

To: Area Director
Boise, Idaho Area Office
Occupational Safety and Health Administration
U.S. Department of Labor

Application having been made, and Court finding there is sufficient cause to permit entry for inspection and investigation at the establishment and workplace described as:

Hern Iron Works, Inc.
Atlas Road
Coeur d'Alene, Idaho

IT IS HEREBY ORDERED that pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*), hereinafter referred to as the Act, YOU or OTHER DULY DESIGNATED REPRESENTATIVES of the Occupational Safety and Health Administration, U.S. Department of Labor, ARE AUTHORIZED to enter the above described premises during regular working hours or at other reasonable times,

and to inspect, to take environmental samples and photographs related to the purpose of the inspection, and to investigate in a reasonable manner and to a reasonable extent, the aforesaid worksite and business where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

A return shall be made to this Court showing that the inspection has been completed, within fifteen (15) days after completion thereof.

DATED this 16th day of June, 1980.

/s/ Ray McNichols
UNITED STATES
DISTRICT JUDGE

Presented by:

/s/ William W. Kates
William W. Kates

RETURN

Inspection of the establishment described in this warrant was made on _____.

_____
Compliance Safety &
Health Officer
Occupational Safety and
Health Administration
U.S. Department of Labor

EXHIBIT I

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
U. S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

In the Matter of	)	
	)	
Establishment Inspection of:	)	CIVIL NO. M-S-2327
	)	
LEWIS YOUNGSTROM, an	)	**APPLICATION FOR AN**
individual, doing business as	)	**INSPECTION WARRANT**
YOUNGSTROM'S LOG HOMES	)	
U. S. Highway 91	)	
Blackfoot, Idaho	)	
_____	)	

COMES NOW Ray Marshall, Secretary of Labor, United States Department of Labor, acting through the Occupational Safety and Health Administration, by and through the undersigned Attorney, and applies to this Court for an inspection warrant pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*), hereinafter referred to as the Act, and in support of such Application alleges, upon information and belief, as follows:

1. That Lewis Youngstrom, an individual doing business as Youngstrom's Log Homes, is engaged in the operation of a worksite and business located on U.S. Highway 91 approximately one mile south of the intersection of U.S. Highway 91 and Interstate Highway I-15, in Blackfoot, Idaho, within the jurisdiction of this Court, where work is performed by employees of the employer engaged in the

manufacture and sale of log beams and other building components used in log homes, such activities being performed through the use of equipment and materials obtained in part from sources outside the State of Idaho, and is otherwise engaged in a business affecting commerce within the meaning of Section 3 of the Act. This has been true at all times pertinent hereto.

2. That the desired inspection and investigation are contemplated in response to an employee safety and health complaint requesting such an inspection pursuant to Section 8(f)(1) of the Act and as a part of an inspection program designed to assure compliance with the Act, and are authorized by Section 8(a) of the Act, all as more fully described in the affidavit of Jack M. Haning, which affidavit is attached hereto and incorporated herein by this reference.

3. That the inspection and investigation will be conducted during regular working hours or at other reasonable times, within reasonable limits, and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor at 29 C.F.R. Part 1903. Appropriate credentials as representatives of the Occupational Safety and Health Administration, U.S. Department of Labor, hereinafter referred to as representatives, will be presented to the employer, and the inspection will be commenced as soon as practicable after the issuance of this warrant and will be completed with reasonable promptness.

4. That the inspection and investigation will extend to the aforesaid establishment or other area, workplace, or environment where work is performed by employees of the employer, and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether this

employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations and orders issued pursuant to the Act.

5. That the representatives may be accompanied by one or more employees of the employer, pursuant to Section 8(e) of the Act.

6. That a return will be made to the Court at the completion of the inspection and investigation.

7. That on November 3, 1980, at the aforesaid location, duly designated representatives of the Secretary of Labor, pursuant to and in accordance with the Act, presented themselves to the owner, operator, or agent in charge thereof for the purpose of conducting a safety and health inspection at said location under the authority of the Act. At the attempt to carry out said purpose, said representatives were refused entry upon the premises by Mr. Lewis Youngstrom. More particular details of such refusal are set forth in the aforesaid affidavit of Jack M. Haning.

WHEREFORE, the applicant prays that this Court enter a Warrant for Inspection in the form as annexed hereto.

DATED this 26th day of November, 1980.

Carin A. Clauss
Solicitor of Labor

Daniel W. Teehan
Regional Solicitor

Robert A. Friel
Associate Regional Solicitor

William W. Kates
Attorney

By /s/William W. Kates
William W. Kates

U.S. DEPARTMENT OF LABOR

EXHIBIT J

AFFIDAVIT

STATE OF IDAHO)
) ss
COUNTY OF BANNOCK)

JACK M. HANING, being first duly sworn on oath, deposes and says:

1. That I am now and at all times material hereto have been a Compliance Safety and Health Officer of the Occupational Safety and Health Administration (OSHA), United States Department of Labor, with offices at 250 South Fourth, Suite 178, Pocatello, Idaho 83201. My duties and responsibilities as a Compliance Safety and Health Officer include the making of safety and health inspections of worksites under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C.A. section 651 *et seq.*), hereinafter referred to as the "Act".

2. That on November 3, 1980, Mr. Garney B. Coffey, another Compliance Safety and Health Officer, and I arrived at the work establishment maintained by Lewis Youngstrom, an individual doing business as Youngstrom's Log Homes, and located on U.S. Highway 91 approximately one mile south of the intersection of U.S. Highway 91 and Interstate Highway I-15 in Blackfoot, Idaho. The purpose of our visit was to conduct a safety and health inspection of such establishment, pursuant to the authority of section 8 of the Act and instructions from my supervisor in the Boise, Idaho area office.

3. That the inspection was attempted to be made in response to a complaint alleging possible violations of the Act and requesting such an inspection, all pursuant to section 8(f)(1) of the Act. Such complaint was made on October 27, 1980, through a telephone call from an employee of Youngstrom's Log Homes and received by myself in the Pocatello OSHA office. In the course of my telephone discussion with the complainant, Mr. Richard Mangum, he

advised me that he had suffered an accident at the worksite on October 21, 1980, and was presently in Bingham Memorial Hospital in Blackfoot, Idaho. In light of the seriousness of the injuries he had suffered, I then went to the hospital in Blackfoot to interview the complainant.

4. That upon my arrival at the hospital at approximately five o'clock in the afternoon of October 27, 1980, I met with Mr. Mangum in his room. He told me that he had injured his foot on the afternoon of October 21, 1980, when it became caught in an unguarded chain sprocket on a debarker machine. He further told me that surgery had been performed on the afternoon of October 21, but that such surgery had not been successful and that he was scheduled for additional surgery on October 28 to amputate his big toe and an additional toe. Mr. Mangum is a twenty-three year old male who stated that he had been working at Youngstrom's Log Homes since September of this year in his current employment and that he had worked there on previous occasions also. During the course of our discussions, I prepared a complaint form from the information he provided, which complaint form Mr. Mangum then signed. A copy of such complaint is attached hereto.

5. That at approximately 3:00 p.m. on November 3, 1980, Mr. Coffey and I arrived at the worksite of Youngstrom's Log Homes. Upon our arrival we met Mr. Lewis Youngstrom, who I knew from previous visits to the worksite to be the owner of the firm. We introduced ourselves to him and presented to him our credentials as Compliance Safety and Health Officers with OSHA. We explained to him the purpose of our visit, which was to make a safety and health inspection of the worksite pursuant to a complaint we had received. He asked if the complaint had anything to do with a recent foot injury to an employee. I advised Mr. Youngstrom that such matter was among the items mentioned in the complaint. Mr. Youngstrom said that he would be willing to let us look at the debarker, but he then asked if we were going to inspect any things not involving the accident. I advised him that we intended to inspect and investigate all

the matters mentioned in the complaint. Mr. Youngstrom then stated that he would have to refuse us entry, and that we would have to get a warrant. We then left the premises.

6. Our entry into the worksite for the purpose of making a safety and health inspection was not refused by reason of unreasonable time, limit, manner or any other basis provided for by the Act, but was refused solely for reasons stated above.

7. From my observations and discussions while at the worksite and from previous visits, I believe the nature of the business of Youngstrom's Log Homes consists of the manufacture and sale of log beams and other building components used in log homes, such activities being performed through the use of equipment and materials obtained in part from sources outside the State of Idaho.

DATED November 17, 1980.

/s/ Jack M. Haning
JACK M. HANING

SUBSCRIBED AND SWORN to before me this 17th day of November, 1980.

/s/_____
NOTARY PUBLIC in and for the State of Idaho, residing at Downey, Id.

My Commission expires:

3-11-81

EXHIBIT K

This form is prepared for the assistance of any complainant and is not intended to constitute the exclusive means by which a complaint may be registered with the U.S. Department of Labor.

Form Approved
O.M.B. No 044R144

Sec. 8(i)(1) of the Williams-Steiger Occupational Safety and Health Act, 29 U.S.C. 651, provides as follows: Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

NOTE: Section 11 (c) of the Act provides explicit protection for employees exercising their rights, including making safety and health complaints.

	For Official Use Only		
	Area	Date Received	Time
913	0160	10/27/80	5:00 P
	Region	Received By	
sic 2431	10	Gen/DB	Formal ☑
			Non Formal ☐

The undersigned *(check one)*

☑ Employee ☐ Representative of Employees ☐ Other *(specify)* _____

believes that a violation at the following place of employment of an occupational safety or health standard exists which is a job safety or health hazard.

Employer's Name

Youngstrom Log Homes

Blackfoot

Employer's Address *(Street)* *(City)*

Idaho

83221

(State) (Zip Code)

Telephone

785-0632

1. Kind of business

Log Homes

2. Specify the particular building or worksite where the alleged violation is located, including address.

3. Specify the name and phone number of employer's agent(s) in charge.
Lewis Youngstrom, Owner

4. Describe briefly the hazard which exists there including the approximate number of employees exposed to or threatened by such hazard.

1. Inadequate hearing protection [text illegible in copy]
2. No one trained in first aid [text illegible in copy]
3. Chain & sprockets on log peeler not guarded.
4. Trim saws not guarded [text illegible in copy]
5. Fan on 10" lathe not guarded [text illegible in copy]
6. Grinders electrical cords — wires directly plugged in
7. Guarding of most equipment inadequate
8. Creosote log ends

5. (a) To your knowledge is this condition being considered by any other Government agency, or has it been considered by any other Government agency?

Yes ☐ No ☐

5. (b) If yes, and you know, which Government agency?

6. Has this condition been brought to the attention of the employer?
Yes ☐ No ☐ Don't know ☐

7. Please indicate your desire.
☐ I *do not* want my name revealed to the employer. ☑ My name *may be* revealed to the employer.

NOTE: It is unlawful to make any false statement, representation or certification in any document filed pursuant to the Occupational Safety and Health Act of 1970. Violations can be punished by a fine of not more than $10,000, or by imprisonment of not more than six months, or by both. (Section 17(g))

Signature Richard S. Mangum Date 10/27/80

Typed or Printed Name Richard Mangum

Address *(Street)* 724 Henderson Dr. Apt. 3 *(City)* Blackfoot

(State) ID *(Zip Code)* _____ Telephone _____

[Copy below is illegible]

EXHIBIT L

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
Office of the Solicitor
U.S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In the Matter of	)	
	)	
Establishment Inspection of:	)	CIVIL NO. M-S-2327
	)	
LEWIS YOUNGSTROM,	)	**WARRANT FOR**
an individual doing business as	)	**INSPECTION**
YOUNGSTROM'S LOG HOMES	)	
U.S. Highway 91	)	
Blackfoot, Idaho	)	
_____	)	

To: Area Director
Boise Idaho Area Office
Occupational Safety and Health Administration
U.S. Department of Labor

Application having been made, and the Court finding there is sufficient cause to permit entry for inspection and investigation at the establishment and workplace described as:

Youngstrom's Log Homes
Manufacturing Worksite
U.S. Highway 91
Blackfoot, Idaho

IT IS HEREBY ORDERED that pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*), hereinafter referred to as the Act, YOU or OTHER DULY DESIGNATED REPRESENTATIVES of the Occupational Safety and Health Administration, U.S. Department of

Labor, ARE AUTHORIZED to enter the above described premises during regular working hours or at other reasonable times, and to inspect, to take environmental samples and photographs related to the purpose of the inspection, and to investigate in a reasonable manner and to a reasonable extent, the aforesaid worksite and place of business where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

A return shall be made to this Court showing that the inspection has been completed, within fifteen (15) days after entry hereof.

Dated this 1st day of December, 1980.

/s/ Ray McNichols
UNITED STATES
DISTRICT JUDGE

Presented by:

/s/ William W. Kates
William W. Kates

RETURN

Inspection of the establishment described in this warrant was made on _____.

_____
Compliance Safety &
Health Office
Occupational Safety and
Health Administration
U.S. Department of Labor

EXHIBIT M

[¶23,839] Sarasota Concrete Company

Text of Judge's Decision dated September 9, 1979. OSHRC Docket No. 78-5264. Cecil L. Cutler, Judge.

Inspection Warrants—Employee Complaints—Inspection Limited to Area of Complaint. The employer's motion to suppress evidence obtained in a wall-to-wall plant inspection based on an ex-employee's complaint about ready-mix concrete trucks was granted on grounds a warrant issued solely on an employee complaint of a specific hazard is not broad enough to authorize an overall inspection. The citation charging eleven nonserious violations, none involving the trucks, was vacated.

There was no showing as required under *Barlow's* that the employer was chosen for the search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources or that it was a high hazard industry. No probable cause was established to authorize the Secretary to go beyond the specifics in the warrant application.

Review was directed on whether an employee complaint warrant inspection should be limited to the area complained of and whether evidence suppression is appropriate when the employer successfully challenges the lawfulness of a search warrant.

Charles Kelso, Michael C. Towers for the employer. Baruch A. Fellner and Bobbye D. Spears for the Secretary.

[Text of Judge's Decision]

CUTLER, Judge: Following an inspection of its workplace in Sarasota, Florida, on October 10, 1978, respondent was issued a citation alleging 11 nonserious violations pursuant to section 9(a) of the Occupational Safety and Health Act of 1970 (29 U. S. C. 651, *et seq.*, hereinafter the "Act").

Respondent has filed a motion to suppress all evidence obtained as a result of the inspection which was made under a warrant issued October 6, 1978.

The parties have agreed to stipulate the facts so that a ruling on the motion can be made on the record. Further, without admitting the violations, respondent states that, if the ruling on the motion is adverse to it, it would offer no evidence in rebuttal of the Secretary's evidence and, as to this, respondent would accept the citation of violations as tantamount to affidavits of the compliance officer for the purpose of the Secretary meeting his burden of proof.

The operative facts, as set forth in the stipulation, as [*sic*] as follows:

> "1. On March 17, 1978, an individual by the name of Samuel Storey filed a Complaint with the Occupational Safety & Health Administration, Tampa Area Office. [Not reproduced.]
>
> "2. At the time of the filing of the Complaint, Samuel Storey was not an employee of Sarasota Concrete. He had been fired on March 8, 1978.
>
> "3. On March 23, 1978, a Compliance Officer with the Occupational Safety & Health Administration requested entry upon the work place for inspection. He was advised that it is corporate policy to require an inspection warrant.
>
> "4. On October 6, 1978, the Area Director of the Occupational Safety & Health Administration, Tampa Division, filed with The United States Magistrate in the United States District Court for the Middle District of Florida, and 'application for administrative inspection warrant under the Occupational Safety & Health Act of 1970.' [Not reproduced.]
>
> "5. On October 6, 1978, the United States Magistrate, The Honorable Paul Game, Jr., issued a warrant ordering that the Area Director of the Occupational Safety & Health Administration or his authorized Compliance Officers be authorized to conduct an inspection and investigation of the work place of Sarasota Concrete Company. [Not reproduced.]

"6. On October 10, 1978, a Compliance Officer from the Occupational Safety & Health Administration appeared at the work place of Sarasota Concrete and served the Plant Manager with a copy of the warrant.

"7. The Plant Manager permitted the inspection ordered in the warrant.

"8. The Compliance Officer inspected the entire work place.

"9. As a result of the inspection a citation of violations, which is the subject matter of this litigation, issued citing 12 violations of standard regulations or sections of the Act.

"10. No penalty attached to any of the alleged violations.

"11. The Employer filed a timely Notice of Contest to each of the alleged violations.

"12. Corrective action was taken by Sarasota Concrete for each of the standards allegedly violated and notification of the corrections served on the Occupational Safety & Health Administration, Tampa Area Office. [Not reproduced.]

It also appears from the allied papers that none of the ready-mix concrete trucks — the subject of the complaint — were cited by the Secretary as a result of the inspection.

The primary issue in this case is whether the warrant issued upon the Secretary's application was overly broad and therefore probable cause did not exist with respect to evidence obtained to support the citation issued.

In *Marshall v. Barlow's Inc.*, 436 U. S. 307 (1978), the Supreme Court declared the Occupational Safety and Health Act of 1970 was unconstitutional insofar as it authorized inspection without warrants or their equivalent. The court ruled that, for the purposes of an administrative search under the Act, probable cause justifying the issuance of a warrant may be based upon: (1) specific evidence of an existing violation, or (2) a showing that

"reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular [establishment]" citing *Camara v. Municipal Court*, 387 U. S. 523 and [*sic*] 538 (1967). "A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect on [*sic*] employer's Fourth Amendment rights."

Barlow [*sic*], supra, requires that probable cause for an administrative search can be established either by (1) specific evidence of an existing violation or, alternatively, (2) a showing that reasonable legislative or administrative standards are satisfied with respect to a particular establishment.

The scope or extent of a search or inspection authorized by a warrant must, to accommodate the Fourth Amendment, be reasonable in light of the facts upon which the government interest in the search is based and all areas reasonably related to the subject matter of those facts.

In this case, the government relied upon the prong of *Barlow* [*sic*], *supra*, — an existing violation — to support its showing of probable cause. The application for the warrant does not allege that it is part of a specific inspection or investigation program designed to assure compliance with the Act. In other words, there is no showing that respondent's industry was in the "high risk" category or that there was a high rate of injuries, that it was the subject of previous citations, or other specific neutral criteria.

Several post-Barlow [*sic*] federal court decisions have addressed the issue of the sufficiency of a warrant under the Fourth Amendment requirement. *Central Mine Equipment Company*, 1979 CCH OSHD ¶23,309 (E. D. Mo. 1978), stands for the proposition that a warrant based on a specific employee complaint must be limited to an inspection of the particular hazard named in the complaint. In *Northwest Airlines, Inc.*, 587 F. 2d (7 CA. 1978), the court affirmed that, inasmuch as the Secretary's affidavit for the warrant did not provide the magistrate with

a particularized description and identity of an administrative or legislative program which would support an inspection of the entire workplace, the probable cause requirements were not met. The Seventh Circuit, in a later decision, *Weyerhauser Co. v. Marshall,* 1979 CCH OSHD ¶23,325, — F. 2d — (7th Cir. 1979), emphasized the importance of specificity in warrants and decried the use of "boilerplate" language in the application.

Probable cause was found in another case involving two respondents before the Seventh Circuit (*In the matter of Establishment Inspection of Gilbert and Bennett Manufacturing Co., and Marshall v. Chromalloy American Corp.,* 1979 CCH OSHD ¶23,243, — F. 2d — (7th Cir. 1979). In the *Gilbert and Bennett* case, there was an employee complaint and a history of OSHA violations. The *Chromalloy* case inspection was based upon a showing of high incidence of occupational injuries in the foundry industry. Likewise in *Dravo Corp. v. Marshall,* 5 BNA OSHC 2057, (DC W. D. Pa. 1977) affirmed 578 F. 2d 1373 (3rd Cir. 1978), there were a number of prior complaints and inspections involved.

Considering the present state of the law, I must conclude that a warrant issued solely upon an employee complaint and directed to a specific hazard is not broad enough to authorize an overall inspection. In this case there was no showing, as required under *Barlow* [*sic*], *supra,* that respondent was chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources. Thus, no probable cause was established to authorize the Secretary to go beyond the specifics detailed in his application for the warrant.

Respondent's motion to suppress evidence is granted. Citation Number 1 is vacated.

So Ordered.

Dated this 7th day of August, 1979.

QUESTION PRESENTED

Whether the warrants authorizing the inspections of petitioners' business premises pursuant to the Occupational Safety and Health Act of 1970 were overbroad.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2193

HERN IRON WORKS, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ETC.

LEWIS YOUNGSTROM, ETC., PETITIONER

v.

U.S. DEPARTMENT OF LABOR, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Hern Iron Works, Inc.* v. *Donovan* (Pet. App. B-1 to B-8) is reported at 670 F. 2d 838. The oral opinions of the district courts in both cases are unreported.

JURISDICTION

The judgment of the court of appeals in *Hern* was entered on March 1, 1982. The notice of appeal in *Youngstrom* was docketed on June 26, 1981. The petition for a writ of certiorari was filed on May 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Hern Iron Works, Inc., operates a foundry in Coeur d'Alene, Idaho, where it produces molded iron castings (Pet. App. E-2). On March 23, 1979, a Hern employee representative filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging the existence of two serious hazards at the foundry: (1) employees were required to pour molten metal without instruction and without protective equipment or clothing, and (2) there was no ventilation system in the foundry area (*id.* at G-2). Based on that information, and pursuant to Sections 8(a) and 8(f)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a) and 657(f)(1),[1] and to

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[1]Section 8(a), 29 U.S.C. 657(a), authorizes the Secretary of Labor "(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area * * * where work is performed by an employee of an employer, and (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein * * *."

Section 8(f)(1), 29 U.S.C. 657(f)(1), provides that where an employee or employee representative believes "that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists," he may "request an inspection" by presenting a signed, written notice to the Secretary "set[ting] forth with reasonable particularity the grounds for the notice * * *." If the Secretary then "determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative * * * in writing of such determination."

the pertinent OSHA regulation and program directive,[2] the Secretary applied to the United States District Court for the District of Idaho for a warrant to inspect Hern's premises (Pet. App. E-1 to E-4). The application, which was supported by an affidavit and a copy of the complaint, requested authority to conduct a full-scope inspection of the workplace (*id.* at E-3).

On June 16, 1980, the district court issued the requested warrant (Pet. App. H-1 to H-2),[3] which entitled OSHA inspectors to enter Hern's workplace

> during regular working hours or at other reasonable times, and to inspect, to take environmental samples and photographs related to the purpose of the inspection, and to investigate in a reasonable manner and to a

---

[2]The Secretary's regulation, 29 C.F.R. 1903.11(b), states that occupational safety and health inspections in response to formal employee complaints "shall not be limited to matters referred to in the complaint."

OSHA Instruction CPL 2.12A, [1978-1979 Transfer Binder] Empl. Safety & Health Guide (CCH) para. 11,743, which went into effect September 1, 1979, provided that complaint inspections in high-hazard industries should generally extend to the entire facility, but should be limited to the scope of the complaint in low-hazard industries. CPL 2.12A was pertinently incorporated into OSHA Instruction CPL 2.45, OSHA's Interim Field Operations Manual, on September 15, 1980, and replaced by OSHA Instruction CPL 2.12B, 3 Empl. Safety & Health Guide (CCH) para. 12,451, on February 1, 1982. The latter directive, which is currently in effect, further limits the circumstances under which full-scope complaint inspections will be conducted. This new directive generally limits inspections to complaint matters unless the establishment itself has a higher-than-average lost workday injury rate and is a member of a high-rate industry.

[3]OSHA had previously obtained two other warrants to inspect Hern, but had been unable to execute them. In early June 1979, the district court refused to enforce its April 18, 1979, warrant over the company's objection that the warrant had been improperly issued to John Hern rather than to the company (Pet. App. B-3). On June 9, 1980, after much delay, the district court refused to enforce its June 22, 1979, warrant, this time holding that service of the warrant had been improper (*ibid.*).

> reasonable extent, the aforesaid worksite and business where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.[4]

Hern refused to honor the warrant, and the Secretary petitioned the district court to hold the company in civil contempt. At a hearing on the matter, the court rejected Hern's various objections to the warrant, including its contention that the scope should be limited to items mentioned in the employee complaint (Pet. App. B-3). It found the company in contempt and fined it $1000 for its "deliberate" disobedience (*id.* at C-1).

The court of appeals affirmed (Pet. App. B-1 to B-8). It found "no lack of reasonableness" in the issuance of a full-scope warrant in this case (*id.* at B-6) and concluded that broad inspections in response to employee complaints

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[4]After the Hern warrant was issued, OSHA's rules of practice and procedure concerning agency access to employee medical records went into effect. See 29 C.F.R. 1913.10. Under those rules, each request for personally identifiable employee medical information must generally be made pursuant to a written access order approved by the Assistant Secretary of Labor for Occupational Safety and Health upon recommendation of the OSHA Medical Records Officer. 29 C.F.R. 1913.10(d)(1). Accordingly, when conducting his investigations in these cases, the Secretary will not inspect any such information without first following the prescribed procedures.

are generally proper (*id.* at B-7 to B-8). The court first noted that the warrant application had been " 'in response to an employee safety and health complaint submitted pursuant to Section 8(f)(1) of the Act *and as a part of an inspection program designed to assure compliance with the Act*' " (*id.* at B-6; emphasis added by the court of appeals; footnote omitted). In the court's view, the agency's guidelines on employee complaints "protect commercial property owners from 'unbridled discretion [of] executive and administrative officers [,]' *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 * * * (1978), by assuring that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' *Camara* v. *Municipal Court*, 387 U.S. 523, 538 * * * (1967)" (Pet. App. B-7 n.4). Second, the court ruled that "[t]he magistrate could reasonably have inferred that inspection of the entire Hern establishment was necessary to detect ventilation hazards" (*id.* at B-7). It pointed out that there was no information before the judge indicating that the Hern facility was either a multi-faceted establishment or too large for a full-scale inspection to be reasonable (*ibid.*).[5]

2. Petitioner Youngstrom manufactures log beams and other building components used in log homes at a facility in Blackfoot, Idaho (Pet. App. I-1 to I-2). On October 21, 1980, a Youngstrom employee seriously injured his foot when he caught it in the unguarded chain sprocket of a debarker machine (*id.* at J-2). The employee, who was subsequently hospitalized, telephoned OSHA and reported the accident to an agency compliance officer (*id.* at J-1 to J-2). When the compliance officer interviewed the injured

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[5]The court also held that the probable cause supporting the warrant was not stale (Pet. App. B-4 to B-5) and that the scope of the document inspection authorized by the warrant was proper (*id.* at B-7).

employee at the hospital, the employee filed a formal complaint concerning eight hazards at the Youngstrom workplace (*id.* at K-1 to K-3).[6] On November 3, 1980, in response to the complaint and in accordance with the Act and relevant administrative standards,[7] an OSHA compliance officer attempted to inspect Youngstrom, but the company refused to permit investigation of anything other than the particular machine involved in the accident (*id.* at J-2 to J-3).

Thereafter, on December 1, 1980, the United States District Court for the District of Idaho granted the Secretary's application for a warrant authorizing a full-scope inspection of the Youngstrom facility (Pet. App. L-1 to L-2).[8] However, on December 8, 1980, the company refused to permit the compliance officer to execute the warrant (*id.* at D-1). At the subsequent contempt hearing, the district court rejected Youngstrom's argument that the warrant's scope was overbroad, found the company in contempt, and imposed a $500 fine (*id.* at D-1 to D-2). Youngstrom filed a notice of appeal from the district court's judgment. That appeal is still pending.

ARGUMENT

Petitioners urge the Court to grant review in these cases in order to determine whether an OSHA warrant based on an employee complaint must restrict the inspection to those

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[6]The employee complaint alleged that hearing protection was inadequate; that no one was trained in first aid; that the log peeler chain and sprockets, the trim saws, and the fan on the 10-inch lathe were unguarded; that guarding on most equipment was not adequate; that the grinders' electrical cords were unsafe; and that the process of applying creosote to log ends was hazardous (Pet. App. K-2).

[7]See notes 1 and 2, *supra*.

[8]The scope of inspection provided for in the Youngstrom warrant was identical to the Hern warrant's scope (Pet. App. L-1 to L-2).

areas of the worksite mentioned in the employee complaint. This question raises two separate but related issues: (1) whether the Occupational Safety and Health Act authorizes the inspection of worksite areas outside the scope of an employee complaint, and (2) if so, whether such inspections are reasonable under the Fourth Amendment. We note that the Court recently declined to review an identical contention on very similar facts in *J.R. Simplot Co.* v. *OSHA*, cert. denied, No. 81-863 (Feb. 22, 1982), and there is no greater reason to review that contention here.[9]

1. To begin with, the scope of the inspection for which authorization was sought in these cases was determined by an administrative program directive that is no longer in effect. See note 2, *supra*. That directive, OSHA Instruction CPL 2.12A, required OSHA inspectors to conduct full-scope inspections in response to complaints about working conditions in establishments in high-hazard industries, whether or not the facilities themselves were high-hazard. Under the revised guidelines set forth in CPL 2.12B, which were issued after the warrants involved in these cases had been obtained, full-scope inspections are reserved for complaints about high-hazard establishments in high-hazard industries. Because the Secretary's new directive eliminates

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[9]Petitioner Youngstrom seeks a writ of certiorari before judgment, which "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 18. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 667-668 (1981); *United States* v. *Nixon*, 418 U.S. 683, 686-687 (1974). While Youngstrom asserts (Pet. 15-16) that the question presented here is important to the public, it offers no justification for deviating from "normal appellate practice" to resolve that question in the context of its particular case. Nor could it, since the *Hern* case, in which the court of appeals has rendered judgment, raises the identical issues. Certiorari before judgment in *Youngstrom* is therefore inappropriate.

a great many full-scope complaint inspections, the Court should refrain from deciding the scope issue in the context of these cases, which arise under a now defunct administrative program.[10] Cf. *Cook* v. *Hudson*, 429 U.S. 165 (1976); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

2. Review is particularly inappropriate here because the scope of these warrants would be upheld even by those courts of appeals that do not agree with the Ninth Circuit that full-scope complaint inspections are proper as a matter of law.[11] As a factual matter, the hazardous conditions

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[10]It is impossible to state with certainty whether petitioners' establishments are subject to a full-scope inspection under the new program directive because the Secretary's representatives have not been permitted to review petitioners' employee-injury records. Although both petitioners are in high-hazard industries, until petitioners' records are actually examined it cannot be determined whether petitioners have a higher-than-average lost workday injury rate. If petitioners' injury rates are not above average, then under the Secretary's new directive petitioners would not be subjected to full-scope inspections following employee complaints in the future.

[11]Four other courts of appeals have considered the scope of inspection issue. In an unpublished opinion, the Fourth Circuit affirmed a district court decision holding that full-scope warrants founded on employee complaints are constitutionally permissible. *Marshall* v. *Seaward International, Inc.*, 644 F. 2d 880 (1981), aff'g 510 F. Supp. 314 (W.D. Va. 1980). The Seventh Circuit, in *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F. 2d 1313 (1980), upheld a full-scope warrant based on an employee complaint; however, because each of the three judges on the panel wrote a separate opinion, there was no opinion for the court on the question presented here. The Seventh Circuit had previously upheld a full-scope warrant over objection that the inspection should be limited in scope to the substance of the complaint. *In re Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F. 2d 1335, cert. denied, 444 U.S. 884 (1979), aff'g 1977-1978 Occup. Safety & Health Dec. (CCH) para. 22,270 (N.D. Ill. 1977). See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra*, 625 F. 2d at 1323-1325.

On the other hand, the Third Circuit, in *Marshall* v. *North American Car Co.*, 626 F. 2d 320 (1980), held, solely as a matter of statutory construction, that the scope of OSHA inspections conducted under

reported in each of the complaints were "sufficiently diffuse to sustain the magistrate's determination that a search of the entire workplace was reasonable." *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F. 2d 1313, 1326 (7th Cir. 1980) (Fairchild, C.J., concurring). Since one of the violations alleged to exist in the Hern foundry was "[n]o ventilations [*sic*] system in the foundry area" (Pet. App. G-2), it was, as the court of appeals concluded (*id.* at B-7), reasonable to infer that inspection of the entire facility was necessary. Similarly, the complaint about the Youngstrom workplace described at least two hazards—inadequate hearing protection and inadequate guarding of most equipment (*id.* at K-2)—that could not be associated with a limited area of the facility. In these circumstances, the scope of the inspections authorized by the warrants bore a reasonable relationship to the nature of the hazards alleged (see *Marshall* v. *North American Car Co.*, 626 F. 2d 320, 324 (3d Cir. 1980)), and thus was proper under any of the tests set forth by the courts of appeals that have considered the scope of inspection issue.

3. Although review is not warranted in these cases, we submit that full-scope inspections based on employee complaints are consistent with both the Fourth Amendment and the Occupational Safety and Health Act. Because such inspections are governed by reasonable administrative standards and must be approved by a neutral magistrate, there is no danger that the decision whether to conduct a full-scope search will be left to the unbridled discretion of the officers in the field. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978). Moreover, if full-scope inspections

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29 U.S.C. 657(f) pursuant to an employee complaint must bear an appropriate relationship to the violations alleged in the complaint. And, in dictum, the Eighth Circuit has commented that the Fourth Amendment requires limited-scope inspections. *Marshall* v. *Central Mine Equipment Co.*, 608 F. 2d 719, 720-721 n.1 (1979).

are proper when conducted pursuant to general administrative plans—where there is no specific basis for suspecting that the conditions at a particular facility are in violation of the Act—then it is reasonable to conclude that full-scope inspections should also be permissible where there is probable cause to believe that a violation exists at a particular establishment. See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra,* 625 F. 2d at 1323-1326 (opinion of Sprecher, J.). That is especially so since under OSHA's current program directive, the establishment itself must have a higher-than-average injury rate and must be a member of a high-hazard industry. Finally, Section 8(f)(1) of the Act is a description of the circumstances under which the Secretary *must* conduct an inspection. Thus, the section is essentially an employee rights provision (see *Whirlpool Corp.* v. *Marshall,* 445 U.S. 1, 16 & n.25 (1980)), not a limitation on the Secretary's authority to inspect. See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra,* 625 F. 2d at 1326 (opinion of Sprecher, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1982

DOJ-1982-07

No. 81-2193

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CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

In the Matter of Establishment Inspection of:
HERN IRON WORKS, INC.,

Petitioner,

v.

RAYMOND J. DONOVAN,
Secretary of Labor, U.S. Department of Labor,

Respondent,

and

In the Matter of Establishment Inspection of:
LEWIS YOUNGSTROM, an individual, doing business as
YOUNGSTROM'S LOG HOMES,

Petitioner,

v.

U.S. Department of Labor,
Occupational Safety and Health Administration,

Respondent.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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August 9, 1982

QUESTIONS PRESENTED

1) Does subsection 8(f) of the Occupational Safety and Health Act, which authorizes special inspections pursuant to employee complaints, preclude federal courts from issuing search warrants broader in scope than necessary to determine the existence of violations alleged in the complaint?

2) Does subsection 8(f) of the Act violate fourth amendment probable cause guarantees against unreasonable searches if it is construed to permit the issuance of warrants authorizing inspections which go beyond the scope of employee complaints?

IN THE

Supreme Court Of The United States

In the Matter of Establishment Inspection of:
HERN IRON WORKS, INC.,

Defendant-Petitioner,

v.

RAYMOND J. DONOVAN,
Secretary of Labor, United States Department of Labor,

Plaintiff-Respondent,

and

In the Matter of Establishment Inspection of:
LEWIS YOUNGSTROM, an individual, doing business as
YOUNGSTROM'S LOG HOMES,

Defendant-Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,
Occupational Safety and Health Administration,

Plaintiff-Respondent.

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INTRODUCTION AND SUMMARY OF REBUTTAL

Occupational Safety and Health Administration policy concerning the scope of complaint-based inspections remains substantially unchanged despite the subsequent administrative program directive cited by respondents. Any change effected by that directive, if at all, is merely cosmetic. Moreover, since compliance with the Administrative Procedures Act is not a prerequisite to adoption of such directives, the Agency's new policy guideline reflects nothing more than a transitory alteration in agency procedures, which can be revoked at any time without notice at the Secretary's whim.

Respondents also point to this Court's denial of the Petition for Certiorari in *J. R. Simplot Co. v. OSHA*, 640 F.2d 1134 (9th Cir. 1981) *cert. denied*, No. 81-863 (Feb. 22, 1982), and contend that since that case was factually "similar" and raised "identical" questions of law, denial of this Petition is in order. In fact, however, *Simplot* could not be further divorced from these cases, both as to its facts and as to the contentions raised on appeal. While noting the chaos among the circuit courts of appeal concerning the legitimate scope of complaint-based warrants under the fourth amendment as well as under the Occupational Safety and Health Act, the Ninth Circuit in *Simplot* expressly held that it was not deciding the issue. Thus a decision in this regard from that circuit was not forthcoming until its holding in *Hern Iron Works, Inc. v. Donovan.*

Finally, since *Youngstrom v. United States Department of Labor* raises identical legal issues, is factually similar, and comes to this Court before judgment in the same circuit as does its companion case *Hern Iron Works, Inc. v. Donovan*, principles of judicial economy suggest that this Petition should be granted as to *Youngstrom* as well as in the case of *Hern.*

REBUTTAL

I. OSHA POLICY CONCERNING THE SCOPE OF COMPLAINT-BASED INSPECTIONS REMAINS SUBSTANTIALLY UNCHANGED DESPITE THE SUBSEQUENT ADMINISTRATIVE PROGRAM DIRECTIVE

As grounds for their opposition to this Petition, respondents point to OSHA Instruction CPL 2.12B, issued February 1, 1982, stating that the administrative program under which the scope of the inspections in *Hern Iron Works, Inc. v. Donovan* and *Youngstrom v. U.S. Department of Labor* was determined is now defunct.

This contention is highly misleading.

OSHA Instruction CPL 2.12B amends Instruction CPL 2.12A, which was the program directive in effect at the time the warrants in these cases were sought. Instruction CPL 2.12A, issued September 1, 1979, in turn amended Instruction CPL 2.12, in effect since December 1, 1977. Analysis of these sequential program directive amendments clearly reveals that their impetus was one of administrative economy, rather than one of concern for the constitutional rights of employers.[1] New directive 2.12B, for example, expressly acknowledges that its revised procedures simply reflect a reduction in the Agency's field staff.[2] While the prudence and propriety of thus responding to such considerations is not questioned, petitioners contend that the statutory and constitutional problems which existed under OSHA's prior policy concerning the scope of complaint-based warrants, as set out in their original Petition for Writs of Certiorari, persist even under the new directive.

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[1] OSHA Instructions CPL 2.12B, 2.12A, and 2.12 appear in the Appendix as Exhibits B, C, and D.

[2] OSHA Instruction 2.12B (App., Exh. B). In respectively adopting policy directives 2.12, 2.12A, and 2.12B, OSHA's primary objective was to achieve progressively greater flexibility in targeting inspection activity. OSHA Instruction CPL 2.12B, part F5 (Feb. 1, 1982); OSHA Instruction CPL 2.12A, part F1-2 (Sept. 1, 1979). The efficient utilization of agency resources is in fact offered by OSHA as a justification for full-scope complaint-based inspections. OSHA Instruction CPL 2.12A, part K. Directive 2.12A was not changed in this regard by 2.12B.

Under part J of former directive 2.12A, entitled "Scope of Inspection", inspections conducted pursuant to employee complaints in high-hazard industries generally extended to the entire facility. The new directive, on the other hand, provides that unlimited-scope inspections will not ensue unless the injury records of the particular high-hazard establishment would warrant a full-scope inspection under OSHA Instruction CPL 2.25B. This, however, is the exception, not the rule. Directive 2.12B expressly states that "the inspection of a safety complaint shall *normally* be a comprehensive inspection of the entire workplace". OSHA Instruction CPL 2.12B, part J (emphasis added). Practical application of this directive thus provides little protection against the unconstitutional invasion of an employer's legitimate privacy expectations.

OSHA Instruction CPL 2.25B, modified April 23, 1982, sets out procedures for conducting an "Injury and Illness Records Review" of a particular establishment. OSHA Instruction CPL 2.25B, Appendix D, B3. This procedure involves a mandatory conference between the employer and OSHA compliance officers, as well as a thorough inspection of the employer's employee-injury records. Where this preliminary inspection reveals that a comprehensive inspection would have ensued under directive 2.25B, a second, full-scope inspection of the employer's entire establishment is conducted. Hence, under the new policy directive, an employee complaint coupled with the subsequent mandatory inspection of the employer's injury and illness records, suffice to undermine compliance with this Court's holding in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) that such full-scope inspections be conducted pursuant to an administrative program developed *prior* to the incident of the inspection and based upon *neutral* criteria. *Id.* at 320-21.[3] Rather than reducing the incidence of full-scope inspections,[4] the new directive instead

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[3] Subsection 657(a) of the Occupational Safety and Health Act applies to inspections conducted pursuant to administrative programs, while subsection 657(f) of the Act concerns complaint-based inspections. See 29 U.S.C. §§ 657(a), (f) (1975).

[4] Respondents purport that the new directive "eliminates a great many full-scope complaint inspections", Respondents' Brief in Opposition at 7-8, despite the directive's express purpose to simply re-target such inspections. OSHA Instruction CPL 2.12B, F5.

makes it easier for OSHA to justify this type of inspection, since it can now apparently disregard the *Barlow's* requirement that the "specific business has been chosen . . . *on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources* . . . ". *Id.* at 321. (emphasis added).

A preliminary inspection of the employer's employee illness and injury records, conducted on the basis of a limited and unsubstantiated employee complaint, is simply not the type of neutral administrative plan which constitutionally justifies a general inspection of the employer's entire premises. Nor does it reduce — either conceptually[5] or actually[6]— the incidence of unlimited-scope searches based upon employee complaints. This is especially true in light of the fact that OSHA Instruction CPL 2.12B must be read in conjunction with OSHA Regulation 29 C.F.R. § 1903.11(b) (1981), which, unlike the new policy directive, has the force and effect of law.[7] This regulation, entitled "Complaints by Employees", provides in pertinent part:

> (b) If upon receipt of such notification [of an alleged violation] the Area Director determines that the complaint meets the requirements set forth in paragraph (a) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he

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[5] OSHA instruction CPL 2.25B, D2 (April 23, 1982) establishes a minimum requirement of 12 months injury data in order to determine whether a full-scope search is required. In the absence of such data, full-scope inspections will proceed according to practices in effect prior to the adoption of policy directive 2.12B. Policy directive 2.25B, which is incorporated into 2.12B, provides that where the personal injury data is insufficient, a comprehensive inspection will be conducted. OSHA instruction CPL 2.25B, D8. OSHA instruction 2.25B also provides that even where a comprehensive safety inspection is not warranted, a comprehensive health inspection may nevertheless ensue. *Id.*

Finally, OSHA Instruction CPL 2.45, Chpt. VI, Safety and Health Complaint Processing Procedures (Sept. 15, 1980) provides that "the inspection of a complaint in a high hazard industry should generally extend to the entire facility and should not be limited to the complained of working condition". *Id.*, part H1. Although new directive 2.12B revokes provisions of 2.45 which are inconsistent, part H1 of 2.45 is entirely consistent with part J of 2.12B, and both these directives are in harmony with OSHA Regulation 29 C.F.R. § 1903.11(b) (1981).

[6] Respondents cite no evidence that the new directive has in fact resulted in a reduction of full-scope complaint-based inspections.

[7] See text, *infra*, at 6-7.

> shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. *Inspections under this section shall not be limited to matters referred to in the complaint.*
>
> 29 C.F.R. §1903.11(b) (1981) (emphasis added).

The statutory and constitutional problems raised in this Petition concerning the legitimate scope of complaint-based inspections thus remain regardless of the new policy directive.

A final point in this regard deserves mention. As respondents have themselves acknowledged, it is impossible to state with certainty whether petitioners' establishments are subject to full-scope inspection under the new program directive. Respondents further observe that "although both petitioners are in high-hazard industries, until petitioners' records are actually examined it cannot be determined whether petitioners have a higher-than-average lost workday injury rate." Respondents Brief in Opposition at 8, n. 10. The ironic ramification of respondents' contention is this: while the new directive purports to discourage full-scope inspections unless the high-hazard target establishment also has an above-average accident rate within the contemplation of CPL 2.25, the only method available to determine the latter — and the method mandated by the new directive — is through an exhaustive search of the target establishment's employee injury records. Even were it conceded that the purpose of CPL 2.12B was to protect an employer from unreasonable full-scope complaint searches, the directive utterly fails in this regard. The new policy directive instead purports to protect one right by infringing upon another. Protecting an employer's constitutional expectations of privacy against unreasonable full-scope complaint inspections by subjecting him to a comprehensive records search is like protecting a tree from a tempest by chopping it down.

In fact, the changes evidence by CPL 2.12B do not materially alter or otherwise cure constitutional violations arising out of OSHA's complaint-based inspection policies. Part F6 of the new directive indeed provides:

> The following significant changes in CPL 2.12A are being made in this instruction:
>
> e. Under CPL 2.12A the scope of inspections of high rate industries was generally the entire facility;

> in the case of low-rate industries, only the working conditions identified in the complaint would have been inspected. *That basic approach will be continued in this instruction;* however, changes are being made consistent with the new targeting instruction, CPL 2.25B.

OSHA Instruction CPL 2.12B, part F6. (emphasis added).

Since "that basic approach will be continued in this instruction," this Petiton must be granted in order that the question of the legitimate scope of complaint-based warrants under both the fourth amendment and the Occupational Safety and Health Act may be finally resolved.

II. THE TRANSITORY NATURE OF THE SUBSEQUENT ADMINISTRATIVE PROGRAM DIRECTIVE RENDERS IT SUBJECT TO CHANGE WITHOUT NOTICE AT THE AGENCY'S WHIM

It is not conceded that OSHA Instruction CPL 2.12B materially amends CPL 2.12A in such a way as to cure the constitutional violations inherent in the Agency's prior policies. Even were it so conceded, however, there is no adequate safeguard to employers since the transitory status of the subsequent directive renders it susceptible to unilateral repeal without notice as per administrative prerogative. Respondents cite *Cook v. Hudson*, 429 U.S. 165 (1976) and *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), contending that this Court should deny the Petition of *Hern* and *Youngstrom* in view of OSHA's new policy directive. The petitions in *Cook* and *Rice* were denied, however, because in the former case the state legislature had passed a *statute* mooting the issue, while in the latter case a state statute as well as a subsequent *U.S. Supreme Court decision* had resolved the issues. The temporary status of OSHA's new policy directive does not command the weight of a state statute or a decision of this Court, and therefore cannot, under principles established in *Cook* and *Rice*, be said to work a denial of this Petition. In the absence of this Court's ruling concerning the legitimate scope of complaint-based warrants, the Secretary could immediately reinstate its policy of conducting full-scope complaint-based inspections.

Unlike OSHA Regulation 29 C.F.R. § 1903.11(b) (1981), requiring full-scope complaint-based inspections and adopted in conformity with guidelines set out by the Administrative Procedures Act (APA), the administrative program directive here in question does not fall within the ambit of the APA. Thus its status is significantly inferior to that of an OSHA regulation. Just as the new directive was adopted in the absence of procedural safeguards, it can likewise be abolished without complying with the notice and comment requirements of the APA.

III. *J.R. SIMPLOT CO. V. OSHA* IS READILY DISTINGUISHABLE BOTH AS TO ITS FACTS AND CONTENTIONS ON PETITION

In *J.R. Simplot Co. v. OSHA*, 640 F.2d 1134 (9th Cir. 1981) *cert. denied*, No. 81-863 (Feb. 22, 1982), this Court properly declined to review the contention that broad-scope complaint-based warrants were unauthorized under the Occupational Safety and Health Act, or that they were unreasonable within the meaning of the fourth amendment prohibition against unreasonable searches and seizures. Denial was proper because the Nine Circuit in *Simplot*, while noting that "various courts addressing the issue have reached different results" concerning those issues, expressly held that it was not ruling on the matter. As the *Simplot* court unanimously stated:

> *We need not address this broad issue, however, as the facts here require us to do no more than determine the legitimate breadth of the warrant issued by the district court.* In determining the validity of a criminal search warrant, we are limited to the information and circumstances that were available to the issuing officer at the time the warrant was issued. [citations omitted]. Applying this principle here, the proper scope of the inspection warrant is to be determined by considering the information presented to the district court in the warrant application.

J.R. Simplot Co. v. OSHA, 640 F.2d at 1138. (emphasis added).

Until raised by petitioners Hern and Youngstrom, the issues concerning the legitimate scope of complaint-based warrants

were never properly before this Court. The Ninth Circuit in *Hern* below has now held, after surveying the conflicting circuit decisions in this regard, that "[t]he better view is that which permits, absent extraordinary circumstances, general inspections in response to employee complaints." *Hern Iron Works, Inc. v. Donovan,* 670 F.2d 838, 841 (9th Cir. 1982) *quoting Burkhart Randall Division of Textron, Inc. v. Marshall,* 625 F.2d 1313, 1324 (7th Cir. 1980).

Nor is *Simplot* similar on its facts to the cases here on petition. *Simplot* involved the full-scope inspection of two separate corporate divisions, wherein the employee complaint precipitating the warrant gave no indication that the establishment was comprised of more than one building. As initially indicated by *Hern* in this Petition, however, not only were the complained-of violations in *Hern* more specific as to location than those in *Simplot, but the application for the warrant as well as its supporting affidavits all indicated that there was more than one building on the premises.*

These cases are thus diametrically opposed both as to the facts and legal issues decided by the Ninth Circuit.

IV. THE CIRCUITS ARE DIVIDED CONCERNING THE PERMISSIBLE BREADTH OF COMPLAINT-BASED WARRANTS. *See Chart Appearing in Appendix as Exhibit A.*

Respondents acknowledge that the circuit courts of appeal are clearly divided concerning the permissible breadth of complaint-based warrants under both the Occupational Safety and Health Act itself, as well as under the fourth amendment. Respondents' Brief in Opposition at 8-9, n. 11. Respondents further assert, however, that even those courts which recognize the invalidity of general broad-scope warrants in response to employee-complaints would have upheld the warrants in *Hern* and *Youngstrom* under the particular circumstances. Respondents' conclusion in this regard flies in the face of judicial experience to date. As clearly illustrated in petitioners' original Petition for Writs of Certiorari in these cases, as well as in the

Chart appearing herein as Exhibit A, there is absolutely no consistency among the circuit courts of appeal concerning the legitimate scope of complaint-based inspections generally, nor with regard to particular factual settings. Pet. at 8-15. *See* Chart appearing in Appendix as Exhibit A.

V. PETITIONER YOUNGSTROM MEETS THIS COURT'S CRITERIA FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Petitions for writ of certiorari previously granted by this Court "upon a showing that the case[s were] of such imperative public importance as to justify the deviation from normal appellate processes"[8] have traditionally involved issues of great constitutional significance,[9] of otherwise extraordinary national importance,[10] and which raised similar or identical questions of constitutional or other public importance already before the Court in another case.[11] In *Taylor v. McElroy*, 360 U.S. 709 (1959), certiorari was granted before judgment because of the pendancy before the court of another case involving essentially the same important constitutional issues, and since *Taylor* was pending in the *same* court of appeals which had decided the other case.[12]

The Fourth Amendment issues raised by *Youngstrom* are indeed of great constitutional significance since they affect the

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[8] Sup. Ct. R. 18.

[9] Stern and Gressman, *Supreme Court Practice* (5th Ed. 1978). *See Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 579 (1952); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Rickert Rice Mills v Fontenot*, 297 U.S. 110 (1936); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935); *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935).

[10] Stern and Gressman, *Supreme Court Practice* (5th Ed. 1978). *See United States v. Nixon*, 418 U.S. 683 (1974); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947). *Ex parte Quirin*, 317 U.S. 1 (1942).

[11] Stern and Gressman, *Supreme Court Practice* (5th Ed. 1978). *See New Haven Inclusion Cases*, 399 U.S. 392 (1970); *McCulloch v. Marineros de Honduras*, 372 U.S. 10; *White v. Mechanics Securities Corp.*, 269 U.S. 283 (1925); *Hannah v. Larche*, 363 U.S. 420 (1960); *United States v. Thomas*, 362 U.S. 58 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *Johnson v. United States Shipping Board Emergency Fleet Corp.*, 280 U.S. 320 (1930).

[12] The other case was *Greene v. McElroy*, 360 U.S. 474 (1959).

fundamental rights of individuals to be free from unreasonable searches and seizures. *Youngstrom* also raises serious and significant public policy issues, the resolution of which will directly affect thousands of employers across all levels of industry and commerce. Finally, *Youngstrom* raises issues which are identical to those which would already be before this Court in the companion case of *Hern Iron Works, Inc. v Donovan. Hern* is on petition before this Court *after* judgment in the Ninth Circuit Court of Appeals, the *same* circuit in which *Youngstrom* is pending before judgment.

Since *Youngstrom* raises identical legal issues, is factually similar, and comes to this Court before judgment in the same circuit as does its companion case *Hern Iron Works, Inc. v. Donovan*, principles of judicial economy suggest that the Petition should be granted as to *Youngstrom* as well as in the case of *Hern*.

CONCLUSION

For these reasons, Respondents' Argument in Opposition should be dismissed, and the Petition for Writs of Certiorari in both *Hern* and *Youngstrom* should be granted.

Respectfully submitted,

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UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT	
COMPLAINT-BASED WARRANTS MUST BE LIMITED IN SCOPE WHENEVER POSSIBLE	**COMPLAINT-BASED WARRANTS MAY ALWAYS BE UNLIMITED IN SCOPE**
Supreme Court:	*Supreme Court:*
D.C. Circuit:	*D.C. Circuit:*
First Circuit:	*First Circuit:*
Second Circuit:	*Second Circuit:*
Third Circuit: *Marshall v. North American Car Co.*, 626 F.2d 320, 323 (3rd Cir. 1980) *Donovan v. National Bank of America, Inc.*, 516 F. Supp. 674, 678 (E.D. Penn. 1981)	*Third Circuit:*
Fourth Circuit:	*Fourth Circuit:* *Marshall v. Seaward International, Inc.*, 510 F. Supp. 314, 318 (W.D. Va. 1980), *affirmed*, 644 F.2d 880 (4th Cir. 1981)
Fifth Circuit: *Marshall v. Pool Offshore Co.*, 467 F. Supp. 978, 981 (W.D. La. 1979) *Matter of Establishment Inspection of Asarco*, 508 F. Supp. 350, 353, (N.D. Tex. 1981)	*Fifth Circuit:*
Sixth Circuit:	*Sixth Circuit:*
Seventh Circuit:	*Seventh Circuit:* *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1326 (7th Cir. 1980) (minority opinion on this issue)
Eighth Circuit:	*Eighth Circuit:*
Ninth Circuit: *Donovan v. Burlington Northern, Inc.*, 521 F. Supp. 99, 102 (D. Mont. 1981)	*Ninth Circuit:* *Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838, 840-41 (9th Cir. 1982)
Tenth Circuit: *Marshall v. Trinity Industries, Inc.*, 1979 OSHD 29,038, ¶ 23,943 (W.D. Okla., Oct. 15, 1979)	*Tenth Circuit:*
Eleventh Circuit:	*Eleventh Circuit:*
OSHA: *Sarasota Concrete Co.*, 1979 OSHA ¶ 23,839 (OSH Rev. Comm'n., Sept. 9, 1979) *affirmed*, 1981 OSHD 31,527, ¶ 25,360 (OSH Rev. Comm'n., April 28, 1981), *on appeal, Donovan v. Sarasota Concrete Co.*, #81-5621 (11th Cir., *argued* July 1, 1982).*	*OSHA:* OSHA Regulation at 29 C.F.R. § 1903.11

UNDER THE FOURTH AMENDMENT	
COMPLAINT-BASED WARRANTS MUST BE LIMITED IN SCOPE WHENEVER POSSIBLE	COMPLAINT-BASED WARRANTS MAY ALWAYS BE UNLIMITED IN SCOPE
Supreme Court: *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978) *Michigan v. Tyler*, 436 U.S. 499, 507 (1978)	*Supreme Court:*
D.C. Circuit: *Cf. Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981)	*D.C. Circuit:*
First Circuit:	*First Circuit:*
Second Circuit: *Marshall v. Wollaston Alloys, Inc.*, 479 F. Supp. 1102, 1104 (D. Mass. 1979)	*Second Circuit:*
Third Circuit: *Marshall v. North American Car Co.*, 476 F. Supp 698, 707 (M.D. Penn. 1979), *affirmed*, 626 F.2d 320 (3rd Cir. 1980) *BP Oil, Inc. v. Marshall*, 509 F. Supp. 802, 808 (E.D. Penn. 1981) *Donovan v. Metal Bank of America, Inc.*, 516 F. Supp. 674, 679 (E.D. Penn. 1981) *Marshall v. Berwick Forge and Fabricating Co.*, 474 F. Supp. 104, 113 (M.D. Penn. 1979) *Marshall v. Consolidated Rail Corp.*, 1979 OSHD 29,283, ¶ 24,101 (W.D. Pa. Dec. 13, 1979)	*Third Circuit:*
Fourth Circuit:	*Fourth Circuit:* *Marshall v. Seaward International, Inc.*, 510 F. Supp. 314, 318 (W.D. Va. 1980), *affirmed*, 644 F.2d 880 (4th Cir. 1981)
Fifth Circuit: *Marshall v. Pool Offshore Co.*, 467 F. Supp. 978, 982 n. 4 (W.D. La. 1979) *Matter of Establishment Inspection of Asarco*, 508 F. Supp. 350, 353, (N.D. Tex. 1981)	*Fifth Circuit:*
Sixth Circuit:	*Sixth Circuit:*
Seventh Circuit: *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980) (concurring opinion at 1326; dissenting opinion at 1327) (majority opinion on issue) *Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F.2d 1335, 1343 (7th Cir. 1979), *cert. denied*, 444 U.S. 884 (1979) *Weyerhaeuser Co. v. Marshall*, 592 F.2d 373, 378 (7th Cir. 1979) *Matter of Establishment Inspection of Marson Co., Inc., a Corp.*, 1979 OSHD 28,933, ¶ 23,856 (N.D. Ind., June 21, 1979)	*Seventh Circuit:* *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1324 (7th Cir. 1980) (minority opinion on this issue)
Eighth Circuit: *Marshall v. Central Mine Co.*, 608 F.2d 719, 720 n. 1 (8th Cir. 1979)	*Eighth Circuit:*
Ninth Circuit: *Donovan v. Burlington Northern, Inc.*, 521 F. Supp. 99, 102 (D. Mont. 1981)	*Ninth Circuit:* *Hern Iron Works, Inc. v. Donovan*, 670 F.2d 838, 840-41 (9th Cir. 1982)
Tenth Circuit: *Marshall v. Wand W Steel Co., Inc.*, 604 F.2d 1322, 1326-27 (10th Cir. 1979) *Marshall v. Trinity Industries, Inc.*, 1979 OSHD 29,038, ¶ 23,943 (W.D. Okla., Oct. 15, 1979)	*Tenth Circuit:*
Eleventh Circuit:	*Eleventh Circuit:*
OSHA: *Sarasota Concrete Co.*, 1979 OSHD 28,917, ¶ 23,839 (OSH Rev. Comm'n., Sept. 9, 1979)	*OSHA:* OSHA Regulation at 29 C.F.R. § 1903.11

The subsequent history of the administrative law judge's opinion in *Sarasota Concrete Co.* was omitted from the Chart appearing as Exhibit A in Petitioners' initial Petition for Writs of Certiorari in these cases. The administrative law judge's decision was affirmed by the OSH Review Commission with one Commissioner dissenting. The decision of the Review Commission was then taken to the Eleventh Circuit Court of Appeals on a Petition for Review. Although argument was heard on July 1, 1982, no judgment has been rendered by the the Eleventh Circuit.

EXHIBIT B

[¶12,451] OSHA INSTRUCTION ISSUED ON SAFETY AND HEALTH COMPLAINT PROCESSING

Back reference: ¶4014.35.

OSHA *Instruction* CPL 2.12B, issued February 1, 1982, contains revised complaint processing procedures, reflecting a reduction in field staff, which extend the time set for responding and amend the characterization of complaints. Text follows:

Subject: Safety and Health Complaint Processing Procedures

A. *Purpose.* This instruction provides revised guidelines for investigation of complaints concerning alleged unsafe and unhealthful conditions at the workplace.

B. *Scope.* This instruction applies OSHA-wide.

C. *Cancellation.* OSHA Instruction CPL 2.12A, September 1, 1979, Office of Compliance Programming, is canceled. To the extent that the policies and guidelines contained in OSHA Instruction CPL 2.45, Interim Field Operations Manual, Chapters IV and VI, are inconsistent with this instruction, they are revoked.

D. *Action.* Pursuant to Appendix A of this instruction, the Area Director or the safety or health supervisor shall conduct a thorough evaluation of all complaints regardless of the complaint's formality; i.e., whether or not filed in writing by an employee or an employee representative. Such an evaluation will require further contacts with complainants or other employees, their representatives, or other OSHA support staff. But, in no event should a complaint be acted upon until it has been thoroughly evaluated. (See G through J of this instruction.)

E. *Federal Program Change.* This instruction describes a Federal program change which affects State programs. Each Regional Administrator shall:

1. Ensure that this change is promptly forwarded to State designees.

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*Exhibits B, C, D and E are highlighted in part in red ink.

2. Explain the technical content of this change to the State designee as requested.

3. Ensure, within 30 days of forwarding this instruction, that the State submits:

a. A plan change supplement; or

b. A proposed timetable for adoption of the change; or

c. Reasons why it is not necessary for the State to adopt this change.

4. Ensure that within 6 months of forwarding this instruction, the Federal program change (or its equivalent) is implemented and a plan change supplement is submitted by the State to the Region for review and processing.

F. *Background.*

1. Section 8(f)(1) of the Act requires the Secretary or his authorized representative to "make a special inspection . . . as soon as practicable" if he has "reasonable grounds to believe" that a violation of a safety or health standard that threatens physical harm exists and if that condition has been brought to his attention through a written complaint signed by an employee or his representative. OSHA also recognized the value of complaint information received from informal sources, particularly former employees or current employees who are afraid of retaliation and wish to remain anonymous. In OSHA Instruction CPL 2.12, dated December 1, 1977, OSHA adopted a policy of conducting inspections in response to substantially all complaints, both formal and nonformal.

2. However, the policy of investigating substantially all complaints resulted in large backlogs of complaints, many of which did not deal with serious hazards, and in the diversion of OSHA resources from inspecting workplaces with serious hazards. It became clear that

the policy of investigating all complaints adversely affected OSHA's ability to concentrate its resources to conduct programmed inspections in high hazard areas.

3. Although OSHA continued to recognize the importance of responding to complaints from various sources, the agency issued OSHA Instruction CPL 2.12A on September 1, 1979, which allowed the response to take a variety of forms, ranging from an inspection of a complaint to a response by letter, depending upon the formality of the complaint, the nature of the hazard, and the abatement response of the employer. Through this program, OSHA's resources were again focused on effective and expeditious investigations of high hazard complaints and, through its general schedule and special emphasis programs, inspections of high hazard industries and workplaces.

4. In general, the implementation of CPL 2.12A has been successful. Under these procedures, OSHA has continued to respond by inspection to meritorious formal complaints as mandated by the Act. With respect to nonformal complaints, where there is no statutory inspection requirement, the response of employers to OSHA's letter advising them of the complaint items has been favorable. In most cases, hazards identified in the complaint have been removed by the employer upon notification by OSHA; as a result, employees have been protected without an unnecessary expenditure of inspection resources.

5. OSHA has reevaluated CPL 2.12A in light of the field experience in implementing the directive and believes that some changes are necessary to improve complaint-handling procedures and to provide still greater flexibility in targeting inspection activity. In reevaluating the current directive, OSHA has been mindful of its statutory duty to respond to meritorious formal complaints as well as its responsibility to assure that inspections will, to the maximum extent possible, reach the most hazardous workplaces and thus provide

the greatest amount of protection for employees. Thorough evaluation of all complaints continues to be a critical element of OSHA policy and previous instructions regarding this evaluation are being reemphasized. In addition, in accordance with the requirements of the Act, the identity of all formal and nonformal complainants who wish to remain anonymous will be kept confidential.

6. The following significant changes in CPL 2.12A are being made in this instruction:

a. The time frame for response to serious and nonserious complaints is being slightly modified in light of field resource availability. Under CPL 2.12A OSHA attempted to inspect serious complaints within 3 days and other-than-serious complaints within 20 days. Complaints involving serious hazards now will be inspected within 5 working days; those involving other-than-serious conditions will be inspected within 30 working days.

b. Under CPL 2.12A, if a thorough evaluation of a formal complaint did not establish "reasonable grounds to believe a violation or danger exists," no inspection would have been conducted. The new instruction clarifies the original language by saying that, if the complaint does not establish reasonable grounds to believe that a violation threatening physical harm or an imminent danger exists, no inspection shall be conducted.

c. If the complaint alleges a violation of a standard designed to protect against physical harm and the evaluation leads to the conclusion that no physical harm is threatened, no inspection should be conducted.

d. Under CPL 2.12A, in the case of nonformal complaints, a letter would have been sent to the employer advising him or her of the complaint except in the case of imminent danger conditions or "extremely serious" conditions where

an inspection would have been conducted. The distinction between "imminent danger" and "extremely serious" conditions has been unclear to field staff and has led to confusion. The agency believes that inspections conducted in response to apparent "imminent dangers" will permit OSHA to deal with those situations where there are immediate threats to employee safety or health requiring inspection. Accordingly, the reference to "extremely serious" conditions has been deleted.

e. Under CPL 2.12A the scope of inspections of high rate industries was generally the entire facility; in the case of low rate industries, only the working conditions identified in the complaint would have been inspected. That basic approach will be continued in this instruction; however, changes are being made consistent with the new targeting instruction, CPL 2.25B.

f. Pursuant to CPL 2.12A, safety and health complaints filed by former employees who also alleged that they were unlawfully discharged in violation of Section 11(c) of the Act were treated as formal complaints if they otherwise satisfied the requirements of a formal complaint. After evaluating this procedure, it has been determined that, consistent with statutory language, it would be more appropriate to treat such complaints as nonformal unless subsequently referred for inspection by the 11(c) supervisory investigator.

G. *Evaluating Complaints.* A careful exercise of investigatory techniques is necessary for complete evaluation of all complaints. Only supervisory personnel shall evaluate complaints. All evaluation decisions shall be fully documented in the establishment case file, including all information obtained pursuant to the procedures outlined in Appendix A of this instruction. All incoming complaints shall be referred to a designated professional who shall obtain all

available information from the complainant. The complaint shall thereafter be forwarded to the supervisor to complete the evaluation.

1. When a complaint alleges both safety and health hazards, the complaint should be referred to both safety and health supervisors for evaluation. They shall coordinate the handling of the complaint. Supervisors should maximize the use of cross-trained CSHO's to conduct complaint inspections involving both safety and health hazards.

2. An employee or employee representative shall be informed of the right to file a formal complaint in writing pursuant to Section 8(f)(1) and of his/her right, as a matter of law and OSHA policy, to have the identity held confidential, if requested, regardless of the formality of the complaint.

3. The complainant shall be informed that formal complaints generally lead to workplace inspections while nonformal complaints usually result in letters requesting employers to undertake corrective action.

4. If a complainant, filing orally, makes a request to formalize the complaint, the supervisor or designated professional, after confirming that the complainant is indeed an employee or employee representative, shall complete the Complaint, OSHA-7 Form, to the extent possible prior to mailing for complainant's signature. (See Appendix B, letter #5.) If the signed complaint form is not returned within 10 working days, it shall be treated as a nonformal complaint and a letter shall be sent to the employer. If a signed complaint is received after 10 working days but before a letter has been sent to the employer, the complaint is to be considered formal and evaluated as such.

5. If a complainant filing orally declines to formalize his complaint, the supervisor or designated professional shall nevertheless attempt to obtain the complainant's name, address, and telephone number.

6. The complainant shall be advised of the protection against discrimination afforded by Section 11(c) of the Act and shall be informed of the procedure for filing an 11(c) complaint.

7. Safety and/or health complaints filed by former employees who allege that they were fired for exercising their rights under the Act are nonformal complaints and will not be scheduled for investigation but will rather be referred (with no letter to the employer until after review of the complaint by the 11(c) supervisor) as appropriate for investigation of the alleged 11(c) discrimination complaint. In those instances where the 11(c) supervisory investigator determines that the existence or nature of the alleged hazard is likely to be relevant to the resolution of the 11(c) discrimination complaint, he may refer the matter to the Area Director for an OSHA inspection. Any 11(c) complaint alleging an imminent danger, however, shall be handled in accordance with the instructions given in H.1.a.

H. *Responding to Formal Complaints.* All formal complaints meeting the requirements of Section 8(f)(1) of the Act and 29 CFR 1903.11 shall be scheduled for workplace inspections. Section 8(f)(1) requires the agency to inspect formal complaints where there are "reasonable grounds to believe" that a violation of a standard that threatens physical harm or an imminent danger exists. Upon completion of the inspection, the complainant shall be informed by letter as to the results. (See Appendix B, letter #6.)

1. *Priorities for Responding by Inspections to Formal Complaints.* Inspections resulting from formal complaints shall be conducted according to the following priority:

a. *Imminent Danger.* Any complaint which, in the professional opinion of the Area Director or designee, constitutes an imminent danger as defined in the FOM, Chapter IX, shall be inspected irrespective of whether or not it meets the

formality requirements of Section 8(f)(1). It shall be inspected the same day received where possible but not later than the employer's next working day after receipt of the complaint.

b. *Formal Complaints.* Formal complaints, other than imminent danger, will be given a priority based upon the classification and the gravity of the alleged hazards as defined in the FOM, Chapters VIII and XI. Complaints involving potentially serious hazards shall be investigated within 5 working days; those involving other-than-serious conditions within 30 working days.

2. *Circumstances Under Which No Inspection of a Formal Complaint Will be Conducted.* Only under the following exceptional circumstances would a formal complaint not result in an inspection. Instead, the Area Director shall inform the complainant by letter (certified with return receipt requested) that no inspection is warranted (with supporting reasons) and that he or she has a right to appeal this decision. (See Appendix B, letter #1.)

a. A thorough evaluation of a complaint does not establish reasonable grounds to believe that a violation threatening physical harm or an imminent danger exists; e.g., if the complaint alleges a condition which is not covered by a standard or, in the case of a serious hazard, by the general duty clause [5(a)(1)] or if the complaint is so vague and unsubstantiated that the Area Director is unable to make a reasonable judgment as to the nature of the alleged work-place hazard.

b. The complaint concerns a workplace condition which has no direct relationship to safety or health or does not threaten physical harm.

c. As a result of a recent inspection or on the basis of other objective evidence, the Area Director determines that the hazard which is the subject of the complaint is not present or has been corrected.

d. The complaint clearly does not fall within OSHA's jurisdiction, e.g., a complaint which involves conditions inside a mine. In such a circumstance the complaint shall promptly be referred to the appropriate agency.

I. *Responding to Nonformal Complaints.* The procedures described below include a variety of responses to nonformal complaints designed to assure correction of hazards identified in the complaint.

1. *Responding by Letter to Nonformal Complaints.*

a. Upon receipt and evaluation of a nonformal complaint and subject to the exceptions in I.2.b. and I.3, the Area Director or designee, as soon as possible, shall prepare a letter to the employer advising him of the complaint, informing him of the standards allegedly violated (including copies of such standards), and outlining the corrective action required. (See Appendix B, letter #2.) This letter shall be sent by certified mail, with return receipt requested.

b. The employer shall be requested to post copies of OSHA's letter of notification referred to in the previous subparagraph together with all subsequent correspondence dealing with the complaint items, including the employer's response.

c. Concurrent with the letter to the employer, a letter to the complainant shall be prepared explaining that the employer has been informed of the complaint and requesting the complainant to notify the Area Director if no corrective action has been taken or initiated within 30 calendar days (or less if so indicated in the letter to the employer) or if any adverse or discriminatory action or threats are made against the complainant. A copy of the letter to the employer shall be included with the letter to the complainant. (See Appendix B, letter #3.)

d. If a response is received from the employer and it appears that appropriate corrective action has been taken or that no hazard is present, the case file should be closed. The complainant shall be informed of all responses received from the employer. (See Appendix B, letter #4.)

2. *Responding by Inspection to Nonformal Complaints.*

a. Where the employer fails to respond or submits an inadequate response within the period specified in the letter or where the complainant informs OSHA that no corrective action has been taken, the Area Director or his or her designee shall contact the employer to determine what action he plans to take. If no action has been taken and none is planned, the nonformal complaint shall be activated for inspection pursuant to the priorities outlined in H.1.b. Where an ambiguity exists or where the employer has a correction plan which he has not yet had time to implement fully, the Area Director shall communicate further, as appropriate, with the employer and/or the complainant to determine whether the hazard has been corrected and/or what interim protective steps have been taken until its correction has been completed. On the basis of information available, the Area Director will decide whether an inspection is warranted.

b. The procedures outlined in I.1.a involving responses to nonformal complaints by letter shall not be followed where the nonformal complaint involves an imminent danger situation. Rather the procedures indicated in H.1.a. will be followed.

c. Where employers have sent satisfactory corrective action letters, the Area Director shall, nevertheless, select every tenth letter for inspection to assure that the employer's action corresponds to that asserted in his letter. Only satisfactory letters (coded "7" on the OSHA-32, item 12) shall be

included in this procedure. Letters shall be numbered in order of receipt by the Area Office. Employers shall be informed that they are subject to such "tenth letter" inspections.

3. *Circumstances Under Which Nonformal Complaints Will Result in Neither a Letter nor an Inspection.* In those instances where, after a thorough evaluation, a nonformal complaint falls into the categories outlined in H.2, no inspection shall be conducted and no letter shall be sent to the employer. The case will be closed on the grounds that no valid complaint was received. There will be no need to notify the complainant in such cases.

J. *Scope of Inspection*

1. Except as indicated below, the inspection of a safety complaint shall normally be a comprehensive inspection of the entire workplace (except for low-hazard areas, such as office areas). The following guidelines shall be followed in determining exceptions:

a. In a high rate manufacturing establishment (one whose primary SIC code is listed on the Area Office establishment list), an injury records review, as outlined in OSHA Instruction CPL 2.25B, Appendix D, shall be performed. If such a records review would not have resulted in a comprehensive safety inspection under the guidelines of CPL 2.25B, the procedures given in J.3 for a complaint inspection in a low rate industry shall apply.

b. If one of the deletion criteria given in CPL 2.25B, I.1.a(2)(b) applies to a general industry establishment, the procedures in J.3 shall apply.

c. In the construction and maritime industries, if a substantially complete inspection of the establishment has been conducted within the last quarter, the procedures in J.3 shall apply.

2. The inspection of a health complaint in a SIC code industry that is listed on the Health Inspection

Plan will normally be a comprehensive inspection of all areas where a potential serious health problem may exist. Otherwise the procedures outlined in J.3 for a complaint in a low rate industry shall apply.

3. Generally, a complaint inspection in a low-hazard industry should be limited to working conditions identified in the complaint. If, however, the CSHO believes that the scope of the inspection should be expanded because of information indicating the likelihood of serious hazards in other portions of the plant (e.g., because the CSHO has observed them prior to the opening conference or because the records review shows that an unusual number or type of injuries has occurred in one time period, area, or operation) or because of a formal complaint alleging imminent danger or serious hazards received while conducting the inspection, he or she shall contact the Area Director or supervisor. A decision will then be made on the basis of the information that is available whether the inspection should be extended. Whenever such an expanded inspection is to be conducted, the CSHO shall advise the employer and the employee representative of the expanded scope at the opening conference or at the earliest opportunity.

4. Any departure from the scope guidelines given in J of this instruction shall be supported by adequate documentation.

[Appendix omitted]

EXHIBIT C

¶ 11,743 OSHA INSTRUCTION ISSUED ON EMPLOYEE VIOLATION COMPLAINT PROCESSING

Back reference: ¶ 4049.

OSHA *Instruction* CPL 2.12A cancels Instruction CPL 2.12 and creates new guidelines for the processing of employee complaints. Text is as follows:

Subject: Safety and Health Complaint Processing Procedures

A. *Purpose.* This instruction provides guidelines for investigation of complaints concerning alleged unsafe and unhealthful conditions at the workplace.

B. *Scope.* This instruction applies OSHA-wide.

C. *Cancellation.* OSHA Instruction CPL 2.12, December 1, 1977, Office of Compliance Programming, is canceled. To the extent that the policies and guidelines contained in Chapters IV and VI of the Field Operations Manual (FOM) are inconsistent with this instruction, they are revoked.

D. *Action.* Pursuant to Appendix A of this instruction, the Area Director or the safety or health supervisor shall conduct a thorough evaluation of all complaints regardless of the complaint's formality; i.e., whether or not filed in writing by an employee or his representative. An evaluation may require further contacts with complainants or other employees, their representatives, or other OSHA support staff. But, in no event should a complaint be acted upon until it has been thoroughly evaluated. (See paragraph G. through K. of this instruction.)

E. *Federal Program Change.* This instruction describes a Federal program change which affects State programs. Each Regional Administrator shall:

1. Ensure that this change is promptly forwarded to State designees.

2. Explain the technical content of this change to the State designee as requested.

3. Ensure, within 30 days of the forwarding of this instruction, that the State submits:

a. A plan change supplement; or

b. A proposed timetable for adoption of the change; or

c. Reasons why it is not necessary for the State to adopt this change.

4. Ensure that within 6 months of the forwarding of this instruction, the Federal program change (or its equivalent) is implemented and a plan change supplement is submitted by the State to the Region for review and processing.

F. *Background.* Section 8(f)(1) of the Act requires the Secretary or his authorized representative to "make a special inspection...as soon as practicable," if he has "reasonable grounds to believe" that a violation or danger exists, which has been brought to his attention through a written complaint filed by an employee or his representative. In addition to investigating all such formal complaints, OSHA has recognized the value of complaint information received from informal sources, particularly former or current employees who are afraid of retaliation and wish to remain anonymous. Thus, nonformal complaints include oral complaints filed by employees, written and oral complaints filed by nonemployees such as public interest groups and all other miscellaneous information forwarded informally to Area Offices. Accordingly, in various Field Information Memorandums and Program Directives, culminating in OSHA Instruction CPL 2.12, dated December 1, 1977, OSHA adopted a policy of conducting inspections in response to substantially all formal and nonformal complaints.

1. However, the policy of investigating substantially all complaints has resulted in large backlogs of complaints, many of which do not deal with serious hazards, and the diversion of OSHA resources from inspecting workplaces with serious hazards. It has

become clear that the emphasis on investigating all complaints has adversely affected OSHA's ability to concentrate its resources in high hazard areas to conduct programmed inspections as outlined in OSHA Instruction PAE 1.1. This conclusion was reinforced by the General Accounting Office's (GAO) report to the Congress, dated April 9, 1979, criticizing the agency's policy of responding to substantially all complaints. Specifically, the GAO study disclosed numerous complaints which resulted in comparatively few serious violations related to the complained-of-hazards. In addition, while recognizing the importance of promptly responding to complaints, the Senate Report on the complaint provision of the OSH Act underscored the necessity of balancing OSHA's multiple priorities: "By requiring that the special (complaint) inspection be made 'as soon as practicable,' the committee contemplates that the Secretary, in scheduling the special inspection, will take into account such factors as the degree of harmful potential involved in the condition described in the request and the urgency of competing demands for inspectors arising from other requests or regularly scheduled inspections."

2. OSHA continues to recognize the importance of responding to complaints from various sources. However, under this instruction the agency's response will take a variety of forms, ranging from an inspection of a complaint to a response by letter, depending upon the formality of the complaint, the nature of the hazard and the abatement response of the employer. The key to the success of this complaint-responsiveness program is the effective, professional screening and evaluation of formal and nonformal complaints to determine the nature and severity of the hazard; the number of employees potentially exposed; and any injuries, illnesses, or symptoms attributable to the hazard. Through this program, OSHA's resources will be focused on a more effective and expeditious investigation of high hazard complaints and,

through its general schedule and special emphasis programs, inspection of high hazard industries and workplaces.

3. Finally, in accordance with FOM instructions, the identity of all formal and nonformal complainants who wish to remain anonymous will be kept confidential pursuant to Section 8(f)(1) of the Act and the informer's privilege. Moreover, the careful evaluation of all 8(f) and 11(c) complaints by Area Directors and Operations Review Officers for discrimination and safety or health implications, respectively, and the prompt forwarding of all such complaints to the appropriate action office shall continue pursuant to existing OSHA policy. Nothing in this instruction shall be construed as a de-emphasis of the importance of 11(c) complaint processing. Discrimination complaints will continue to be processed in accordance with Chapter XV of the FOM and current instructions (OSHA Instructions DIS .1 and DIS .2).

G. *Evaluating Complaints.* A careful exercise of investigatory techniques is necessary for complete evaluation of all complaints. Only supervisory personnel shall receive and evaluate complaints pursuant to the instructions in Appendix A. All information obtained in the evaluation of complaints shall be recorded and placed in the establishment case file. If, on rare occasions, the appropriate supervisor is unavailable the complainant shall be immediately referred to a designated professional who shall obtain all available information from the complainant. The complaint should thereafter be forwarded to the supervisor, who should attempt to contact the complainant for any additional information necessary to complete the evaluation.

1. When a complaint alleges both safety and health hazards, the complaint should be referred to both safety and health supervisors for evaluation. They shall coordinate the handling of the complaint. Supervisors should maximize the use of cross-trained CSHO's to conduct complaint inspections involving both safety and health hazards.

2. The complainant should be encouraged to file a formal complaint in writing pursuant to Section 8(f)(1), and should be informed that, as a matter of law and OSHA policy, a complaintant's [*sic*] identity will remain confidential, if requested, regardless of the formality of the complaint. The complainant should also be informed that, subject to the exceptions described in paragraph H.2., formal complaints generally lead to workplace inspections, while nonformal complaints may result in letters requesting employers to undertake abatement action, with the exceptions described in I.2.

3. The complainant shall be advised of the protection against discrimination afforded by Section 11(c) of the Act and shall be informed of the procedure for filing an 11(c) complaint.

4. If a complainant declines to file a formal complaint, the supervisor shall attempt to obtain the complainant's name, address and telephone number.

5. If an employee or employee representative agrees to file a formal complaint, the supervisor shall complete the "Complaint," OSHA-7 Form, to the extent possible, prior to mailing for complainant's signature. (See Sample letter #5.) If the complaint is not returned within 10 calendar days, it shall be treated as a nonformal complaint.

6. Safety and health complaints filed by former employees who allege that they were fired for exercising their rights under the Act shall be investigated as formal complaints and copies of these complaints shall be referred to the appropriate office for investigation of the alleged 11(c) discrimination complaint.

H. *Responding to Formal Complaints.* All formal complaints meeting the requirements of Section 8(f)(1) of the Act and 29 CFR 1903.11 shall result in workplace inspections. Section 8(f)(1) requires the agency to inspect formal complaints where there are "reasonable grounds to believe" that a violation or danger exists, without regard to the motive of the

complainant. A letter shall be promptly sent to the complainant acknowledging receipt of the formal complaint and indicating that an inspection of the complained of conditions will be scheduled. (See Sample letter #6.)

1. *Priorities for Responding by Inspections to Formal Complaints.* Inspections resulting from formal complaints shall be conducted according to the following priority:

a. *Imminent Danger.* Any complaint, which in the professional opinion of the Area Director or his designee constitutes an imminent danger as defined in the FOM, Chapter IX, shall be investigated the same day received where possible but not later than 24 hours after receipt of the complaint.

b. All other complaints will be prioritized based upon the gravity of the hazards as defined in the FOM, Chapters VIII and XI. Those complaints involving potentially serious hazards should be investigated within 3 working days; those involving other conditions should be investigated within 20 working days.

2. *Circumstances Under Which No Inspection of a Formal Complaint Will be Conducted.* Only under the following exceptional circumstances would a formal complaint not result in an inspection. Instead, the Area Director shall inform the complainant by letter that no inspection is warranted, the reasons therefor, and that he has a right to appeal this decision. (See Appendix B, Sample Letter #1.)

a. A thorough evaluation of a complaint does not establish "reasonable grounds to believe a violation or danger exists"; i.e., if the complaint is so vague and unsubstantiated that the Area Director is unable to make a reasonable judgment as to the nature of the workplace hazard.

b. The complaint concerns a workplace condition which has no direct or immediate relationship to safety or health.

c. As a result of a recent inspection or on the basis of other objective evidence, the Area Director determines that the hazard which is the subject of the complaint is not present or has been corrected.

d. The complaint clearly does not fall within OSHA's jurisdiction, such as a complaint involving conditions inside a mine. Under such circumstances, the complaint should promptly be referred to the appropriate agency.

I. *Responding to Nonformal Complaints.* The procedures described below include a variety of alternative responses to nonformal complaints designed to assure abatement of hazards identified in the complaint.

1. *Procedures for Responding by Letter to Nonformal Complaints.*

a. Upon receipt and evaluation of a nonformal complaint, and subject to the exceptions in paragraph I.3, the Area Director or designee, as soon as possible, shall prepare a letter to the employer advising of the complaint and of the action required. (See Appendix B, Sample Letter #2.) These letters shall be sent by registered mail, return receipt requested.

b. Concurrent with the letter to the employer, a letter to the complainant shall be prepared explaining that the employer has been informed of the complaint and requesting the complainant to notify the Area Director if no corrective action has been taken within 30 calendar days (or less if so indicated in the letter to the employer) or if any adverse or discriminatory action or threats are made against the complainant. A copy of the letter to the employer shall be included with the letter to the complainant. (See Appendix B, Sample Letter #3.)

c. If a response is received from the employer and it appears that appropriate corrective

action has been taken, or that no hazard is present, the case file should be closed, subject to random followup inspections as described in paragraph I.2.b. The complainant shall be informed of all responses received from the employer. (See Appendix B, Sample Letter #4.)

2. *Procedures for Responding by Inspection to Nonformal Complaints.*

a. Where the employer fails to respond or submits an inadequate response within the period specified in the letter (See paragraphs I.1.a.-b.), or if the complainant informs OSHA that no corrective action has been taken, the nonformal complaint shall be activated for inspection pursuant to the priorities outlined in paragraph H.1.b. However, where an ambiguity exists, the Area Director may communicate further with the employer or complainant to determine whether the hazard has been fully corrected. Failure of the employer to correct a hazard called to his attention by letter could result in the issuance of a willful citation pursuant to Chapter XI of the FOM.

b. Where employers have sent satisfactory abatement letters, the Area Director shall nevertheless select for a followup inspection every tenth letter of these nonformal complaints. The followup inspection should be performed in accordance with paragraph K. within 30 days of receipt of the employer's letter.

c. The procedures outlined in paragraph I.1.a., involving responses to nonformal complaints by letter, shall not be followed where the nonformal complaint involves *an imminent danger* or an *"extremely serious working condition"* or where other special circumstances arise. These nonformal complaints shall be evaluated and scheduled for an inspection within 24 hours. Examples of "extremely serious working conditions" include: (a) lack of

perimeter guarding on a high floor of a building to which a large number of employees are exposed or (b) an exposure to a toxic substance under conditions which strongly suggest a hazard likely to result in serious health effects, such as exposure to high lead concentrations without the use of respirators.

3. *Circumstances Under Which Nonformal Complaints Will Result in Neither a Letter nor Inspection.* In those instances where, after a thorough evaluation, a nonformal complaint falls into the categories outlined in paragraphs H.2. no inspection shall be conducted and no letter shall be sent to the employer. The case will be closed on the grounds that no actionable complaint was received, and a letter to that effect shall be sent to the complainant. (See Appendix B, Sample letter #7.)

J. *Responding to Complaint Backlog.* All currently pending complaints shall be evaluated and processed pursuant to paragraphs G., H., and I. Prior to conducting an inspection of a complaint which is more than 20 working days old, the complainant should be contacted, where possible, to determine the current status of the complaint hazard. If the complainant responds that the hazardous working condition has been corrected, or is otherwise not present at the worksite, the case should be closed and the complaint logs should be adjusted. A confirming letter should be sent to the complainant stating that no inspection will be conducted and the case will be closed because the condition is no longer present. (See Appendix B, Sample Letter #8.) With regard to the complaints requiring inspections, if the safety or health backlogs exceed 5 times the number of available CSHO's to conduct the safety or health inspections, respectively, the Area Director shall advise the Regional Administrator, who should make available resources to the maximum practical extent considering the number and severity of the backlog complaints.

K. *Scope of Inspection.* The inspection of a complaint in a high-hazard industry should generally extend to the entire facility and should not be limited to the complained-of working condition. **Generally, a complaint inspection in a low-hazard industry should be limited to working conditions identified in the complaint. However, if the CSHO believes, on the basis of information indicating the likelihood of hazards in other portions of the plant, that the scope of the inspection should be expanded in a low-hazard industry, he should contact the Area Director or appropriate supervisor. A decision will then be made on the basis of the information whether the inspection should be expanded and the extent to which the inspection should be extended. Whenever such expanded inspections are conducted, the CSHO shall advise the employer and the employee representative of the expanded scope at the opening conference or at the earliest opportunity.** The principal reasons for conducting full-scope inspections when responding to complaints in high-hazard industries are: (1) agency experience indicates that complaint inspections result in the discovery of at least as many hazards not related to the complaint as are related to the complained-of working conditions; and (2) efficient utilization of agency resources. **The time spent traveling to and from the workplace or in opening and closing conferences must be expended regardless of the scope of the inspection. While these factors would also be applicable in low-hazard industries the agency has determined that in the case of high-hazard industries, which are specially targeted for OSHA enforcement, there is a greater likelihood that a full-scope inspection will disclose serious hazards, thus justifying the additional expenditure of agency resources involved.**

[Appendix omitted]

OSHA Instruction CPL 2.12

Subject: Employee Complaint Processing Procedures

1. *Purpose*

The purpose of this directive is to provide guidelines and procedures for the scheduling, review and investigation of complaints concerning alleged unsafe and unhealthful conditions at the workplace.

2. *Documentation Affected*

This directive supplements the policies and guidelines in the OSHA Field Operations Manual (FOM), Chapters IV and VI. Field Information Memorandum (FIM) #76-20, Subject: Complaint Processing, is hereby canceled. In addition, any memorandums or bulletins from the National Office and the Regional Offices to the field which adversely impact the requirements of this directive shall be appropriately modified.

3. *Background*

a. Field Information Memorandum #76-9 dated March 5, 1976, was issued to ensure that a systematic, technical review of Sections 8(f) and 11(c) (of the Act) complaints was made with the intent of recognizing possible safety and health hazard ramifications in 11(c) complaints and conversely to ensure prompt inspection where there appeared to be safety or health hazards without regard to the formality requirements of Section 8(f).

b. Field Information Memorandum #76-20 dated July 2, 1976, replaced FIM #76-9. It provided instructions for issues not covered in FIM #76-9 as well as clarification of other items.

c. Field Information Memorandum #76-20 significantly increased the complaint workload in the field. The number of complaints received and investigated in some regions overtaxed the resources available. This burden introduced complaint backlogs, reduced inspection activity at some field offices in several important safety and health programs and severely decimated planned regional inspection programs.

4. *Explanation*

This directive implements guidelines that represent consensus procedures arrived at by the Regional Administrators, their staffs and the National Office. The guidelines are directed at the prompt and timely receipt and processing of all complaints alleging the existence of safety and health hazards in a workplace. It includes all complaints whether or not such complaints meet the formality requirements of Section 8(f)(1) of the Act. The judicious use of this directive should facilitate timely response and investigation of complaints in the field.

5. *Action*

All complaints, regardless of source or method of receipt, shall be reviewed and evaluated by the Area Director, or designated professional, for (1) possible safety and health implications; (2) determination of classification as imminent danger, serious or other than serious; and (3) scheduling of investigation. The anonymity of all complainants shall be protected under the provisions of Section 8(f)(1) of the Act. Discrimination complaints, Section 11(c) of the Act, will be processed in accordance with Chapter XV of the FOM and current directives. Area Directors shall not construe anything in this directive as a de-emphasis of 11(c) complaint processing. Area Directors and Operations Review Officers shall continue to emphasize thorough reviews of both 8(f) and 11(c) complaints for safety and health and discrimination aspects, and assure prompt forwarding of such complaints to the appropriate action office.

a. *Imminent danger.*

Any complaint, regardless of source, which in the professional opinion of the Area Director or designee may constitute imminent danger, shall be investigated within 24 hours as outlined in the Field Operations Manual (FOM), Chapter IX.

b. *Serious.*

The determination as to whether the complaint represents serious hazards will be made by the Area Director or designee using the procedures in the FOM, Chapter VIII. After determining that the alleged hazardous condition may

be serious, the Area Director should then establish the schedule for investigation based on professional judgment of the gravity of the hazard. In making this judgment, the Area Director should consider the folowing:

- *Severity of Possible Injury or Illness*

  Safety:

  —Death or permanent disability.

  —Loss of sight.

  —Amputations: Arm or leg, hand or foot, finger or toe.

  —Temporarily disabling injuries.

  Health:

  —Cancer.

  —Chronic (cumulative) toxicity.

  —Acute systemic toxicity.

  —Hearing loss.

  —Nervous system disturbances.

  —Respiratory effects.

  —Hematologic (blood) disturbances.

  —Irritation of eye, nose, throat.

- *Probability of Injury or Illness Occurring*

  —High.

  —Moderate.

  —Low.

(1) Serious complaints shall be assigned for investigation immediately after imminent danger and fatality/catastrophe investigations, as designated in the FOM, Chapter IV.

(2) All investigations of serious complaints must be initiated within *3* working days or appropriate justification for delay will be entered on the log. If a backlog of serious complaints exceeding *7* working days persists for 20 working days (total of 27 days), the Area Director shall advise the Regional Administrator. The Regional Administrator shall utilize available resources to

the maximum extent practical and, if necessary, notify the Field Coordinator and seek appropriate assistance to eliminate the backlog.

(3) Normally, if time and resources permit, the inspection should cover not only violations and dangers alleged in the complaint but the entire establishment of the employer. If there has been a very recent inspection, and the CSHO assures himself that a complete inspection is not necessary, only a partial inspection may be made. However, if the CSHO has reason to believe that similar conditions exist in areas of an establishment other than those areas initially brought to his attention in the complaint, he shall broaden the inspection to include such areas. In each case, the CSHO shall advise the employer of any increase in scope of the inspection at the opening conference or at the earliest possible opportunity.

c. *Other than serious.*

All complaints determined to be other than serious shall be categorized as "formal" or "nonformal" complaints. Complaints received from employees and/or their authorized representatives, meeting the specified requirements of Section 8.(f)(1) [*sic*] of the Act, shall be categorized as "formal"complaints. All other complaints, regardless of source (including those from alleged employees and/or representatives who refuse to sign the "Complaint," OSHA-7 Form, or other acceptable document or letter), shall be categorized as "nonformal" complaints.

(1) *Formal.*

Formal complaints shall be assigned for investigation immediately after fatality/catastrophe and serious complaint investigations. Inspections for other than serious complaints made as the result of a formal complaint should be accomplished within *20* working days of receipt. Reports to the Regional Administrator on complaint backlogs should be submitted on a fixed periodic sequence twice a month. Negative reports are encouraged. Regional Administrators are authorized to reduce this requirement to once a month provided procedures are established that prevent unanticipated

accumulations. The scope of the inspection shall be the same as that for a serious determination. (See Paragraph 5.b.)

(2) *Nonformal.*

Inspections made as the result of a "nonformal" complaint should be accomplished within *20* working days of receipt. Nonformal complaints which have not been investigated within a total of *30* working days may, at the discretion of the Area Director, trigger employer participation in the form of a letter request to the employer. At the discretion of the Area Director, with appropriate Regional Office consultation, the letter may be sent on an earlier date. (See instructions in paragraph 5.c.(2)(b).) All inspections initiated as the result of a nonformal complaint shall normally be limited to the areas addressed in the complaint. The employer shall be informed of the two categories of complaint inspections — "formal" and "nonformal." The employer shall be informed that it is our policy to respond to all information concerning safety and health hazards, for the protection of employees and the benefit of employers, and that the information has been thoroughly evaluated by senior safety and health professionals prior to scheduling of the inspection. If information concerning an imminent danger situation or serious violation is noted by the CSHO or brought to the CSHO's attention, appropriate action in accordance with the Act must be taken. The employer's representative will be advised as soon as any such conditions are noted.

(a) *Reevaluation.*

All nonformal complaints which have not been investigated within *40* working days from receipt shall be reevaluated. Action will be taken to determine if the unsafe/unhealthful condition still exists; e.g., contact complainant, if known, employee representative, or any other available

source having knowledge of the workplace conditions. The reevaluation also shall include consideration of the applicability of the particular industry's incident rate or current OSHA special requirements for the industry. If the Area Director determines the complaint does not merit investigation or a letter to the employer, send a letter to the complainant, if known, explaining this. Make a note in the case file and log and close the case. If the complainant is not known, note the explanation in the case file and log and close the case. If the Area Director determines that the complaint should be investigated:

(i) Reschedule the investigation. Consideration shall be given to the current priorities established by the National Office; e.g., high hazard industries, specific health areas, etc. If the employer is in one of these categories, the investigation shall be conducted in accordance with the priorities for that category. If not, reschedule the investigation within the other appropriate inspection category.

(ii) Write explanatory letter to complainant, if known, indicating an investigation will be initiated at a later date.

(b) *Letter to employer.*

If the Area Director realizes that it is unlikely the complaint investigation can be scheduled within 20 working days, he may determine that a letter to the employer is appropriate, and it should be prepared and forwarded. The letter shall advise the employer of the complaint particulars. The employer shall be asked to investigate the alleged conditions and to report to the Area Office the results of the investigation and the action taken (when applicable). The letter shall

also advise the employer of the assistance available; and, inform the employer that an inspection *may* be conducted at some future date. Write a letter to the complainant, if known, advising the complainant of the action taken. A copy of the letter to the employer may be enclosed. The complainant should be asked to notify the Area Director if no corrective action is taken, or if any adverse or discriminatory action is taken against the complainant.

(c) *Complaint log.*

A log of complaints shall be maintained in the OSHA Area Office receiving the complaint. In the event that the complaint is transmitted from the receiving office to another office or agency for action, review or information, the log will indicate a record of the transmittal. The log will also indicate disposition of the complaint. This shall include the fact that an inspection was scheduled and conducted, indicating the date. In the event a decision is made not to conduct an inspection, an explanation will be entered.

6. *Effective Date*

This directive is effective immediately and will remain in effect until canceled or superseded.

EXHIBIT E

OSHA Regulation 29 C.F.R.

§ 1903.11 Complaints by employees.

(a) Any employee or representative of employees who believe that a violation of the Act exists in any workplace where such employee is employed may request an inspection of such workplace by giving notice of the alleged violation to the Area Director or to a Compliance Safety and Health Officer. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or representative of employees. A copy shall be provided the employer or his agent by the Area Director or Compliance Safety and Health Officer no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record publishers, released, or made available by the Department of Labor.

(b) If upon receipt of such notification the Area Director determines that the complaint meets the requirements set forth in paragraph (a) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. Inspections under this section shall not be limited to matters referred to in the complaint.

(c) Prior to or during any inspection of a workplace, any employee or representative of employees employed in such workplace may notify the Compliance Safety and Health Officer, in writing, of any violation of the Act which they have reason to believe exists in such workplace. Any such notice shall comply with the requirements of paragraph (a) of this section.

(d) Section 11(c)(1) of the Act provides: "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."